HUMAN RIGHTS COMMISSION

CONCILIATION UNDER THE RACIAL DISCRIMINATION ACT 1975:

A STUDY IN THEORY AND PRACTICE

by

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FOREWORD

This study gives an account of conciliation processes developed under the Racial Discrimination Act 1975 (Cwlth) and presents it in the context of general theories of conflict resolution, with some comparisons with methods used by other bodies working in related fields in Australia and New Zealand.

When the Human Rights Commission invited Patrick Pentony, former Associate Professor, Department of Psychology, Australian National University to make the study in 1982, it was envisaged that his report would be published as one in a series of monographs reporting major research studies in the field of human rights. Delays in preparing the report for publication and the restricted budget available to the Commission in the final months before it was to cease operations in December 1986, forced the Commission to abandon this plan. A limited number of copies of the work are now being made and distributed to major libraries so that the report will be available to people interested in studying the way that conciliation was used to implement the Racial Discrimination Act in Australia in its first few years.

The views expressed in this report are not necessarily those of the Human Rights Commission or its members and should not be identified with it or them.

November 1986

PREFACE

This Monograph had its origin in a project directed towards the work being undertaken by the conciliation staff of the Commissioner for Community Relations in the implementation of the Racial Discrimination Act 1975 (Cwlth). Work on the project began in September 1982, almost seven years after the promulgation of the Act, when I accompanied two of the conciliators for sixteen days on a working tour of a number of provincial centres on the coastal and tableland areas of northern New South Wales and Queensland as far north as Rockhampton.

It became apparent during the tour and from examination of reports and other relevant material that, while the Act was directed against discrimination on grounds of race, colour or ethnic or national origin against any member of the diverse communities that make up the Australian population, the main conciliatory activity was in the area of relations between the Aboriginal and non-Aboriginal sections of society. While it is true that members of other ethnic groups discussed, with the officers, problems that ranged from difficulties experienced in the immigration of relatives to dissatisfaction with the way a complaint was dealt with by a police officer, the steps taken to resolve the issues to the satisfaction of the persons concerned seemed in such cases to fall short of conciliation as I understand that term. They involved activities which I have called intercession and included such procedures as advising on courses of action to be taken, explaining the rules and practices governing the situation, checking out, where appropriate, the position of the other party and reporting back and, in some cases, making notes of issues raised with a view to further investigation or representation with the appropriate officials on return to Canberra. That is, much of the work involved clarifying issues, giving information and undertaking follow-up action.

From discussion with the officers and subsequent analysis of reports, this seemed to be characteristic of the work in relation to matters other than situations involving disputes between Aboriginals and non-Aboriginals. Such activities are of considerable significance in contributing to the well-being of our multi-cultural society. That they constitute an important part of the work undertaken under the Act is indicated in Chapter 5. However, to the extent that we view conciliation as involving face-to-face confrontations between opposing parties, with the conciliator endeavouring to bring about a constructive and amicable resolution of the dispute, the bulk of such work occurs in the area of relations between Aboriginals and non-Aboriginals. For this reason, in discussing conciliation under the Act, I have focused on this area.

Although envisaged initially as an account of the work of the conciliators, the project was gradually expanded in an attempt to place this work in a broader context. In the process two themes emerged. The first is the nature of conciliation and its role in dispute settlement and conflict resolution. The second is the problem of achieving equitable and harmonious relations between two Sections of society with a history of inequality and exploitation of the one group by the other. While the focus throughout is on relations between members of the Aboriginal and non-Aboriginal communities, I have attempted to extend the discussion to the broad issue of intercommunity relations in general.

I wish to thank:

(1) the Law Foundation of New South Wales and John Schwartzkoff and Jenny Morgan for permission to quote from and make use of their report on Community Justice Centres;

(2) Dr Andrew Trim n of Massey University for permission to make extensive use of his reviews of conciliation under both the Australian and New Zealand Acts;

(3) an anonymous member of a Consultative Committee on Community Relations for permission to use a lengthy tape-recorded account of experiences on such a committee; and

(4) Mrs Norma Sarra for permission to use her account of experiences leading to the formation of the Bundaberg Consultative Committee on Community Relations.

I am also indebted to many people for assistance in bringing this undertaking to fruition. The members of the Human Rights Commission, and in particular the Chairman, Dame Roma Mitchell, and the Deputy Chairman, Mr Peter Bailey, provided constructive criticism and made valuable suggestions as the project took shape. The first Commissioner for Community Relations, the Hon. A.J. Grassby, provided information and encouragement in the initial stages of the work, and his successor, Mr Jeremy Long, continued to provide generous help and support. The conciliation staff in the Human Rights Commission, in particular Mr George Wyer, Chief Conciliator, and Mr Philip Moss, Senior Conciliator, who took me with them on a long working tour, and Ms Erna Valetti, Complaints Officer, were invariably helpful in discussing their work, supplying information and making available relevant publications and related material. Dr Severin Ozdowski, who supervised the project, was extremely helpful in administrative matters and in organising appointments and interviews with persons whom he considered I should meet. Mrs Josephine Tiddy, the South Australian Commissioner for Equal Opportunity, gave me a detailed account of the conciliation procedure followed in her office and checked the relevant section of the manuscript. Mrs Fay Marles, Victorian Commissioner for Equal Opportunity, was not only generous with her time in discussing the work of her office, but also supplied extensive notes made during a tour of North America devoted to a study of conciliation practices under equal opportunity legislation. The staff of the Surry Hills Community Justice Centre and Mr Clive Graham provided

demonstration of their mediation procedures and explained the underlying rationale.

Particular thanks are due to the many informants, Aboriginal and non-Aboriginal, complainants and respondents, who patiently and courteously shared something of their experiences with me and helped me towards a greater awareness of community relations in Australia.

Finally, but by no means least, I want to thank the office staff of the Department of Psychology of the Australian National University for their patient and cheerful co-operation in the long and tedious task of typing the manuscript.

P. Pentony
April 1985

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CHAPTER 1. INTRODUCTION

On 13 October 1966, Mr Paul Hasluck, in his capacity as Minister for External Affairs, signed the International Convention on the Elimination of All Forms of Racial Discrimination on behalf of Australia. At that time there was no specific prohibition in Australian law of racial discrimination and no legal or administrative machinery to combat it. Such provision for the protection of the rights of the members of minority groups as existed was limited to that provided by the common law. To ratify the Convention, it was necessary to establish machinery to combat racial discrimination and this was achieved finally on 31 October 1975 when the Racial Discrimination Act 1975 (Cwlth) came into force.[1]

The Act was passed by unanimous decision of all the parties in both Houses of the Commonwealth Parliament. While this unanimity reflected the common desire of the members of both Houses to eliminate racial discrimination, agreement as to the means whereby this was to be achieved was arrived at only after long debate and in a spirit of compromise.

The Bill introducing the legislation followed the definition used in the International Convention. It set out to

> make it unlawful for a person to do an act involving discrimination based on race, colour, descent or national or ethnic origin which impairs the enjoyment of fundamental rights and freedoms.2

The machinery established to implement the legislation consisted of the appointment of a Commissioner for Community Relations[3], who was invested with powers designed to settle matters of complaint of racial discrimination and to promote harmonious relations between the different community groups. The area of contention among the legislators was centred around the powers of the Commissioner and the sanctions to be imposed on offenders under the Act.

While there was general agreement that the long-term aim was harmonious inter-personal and inter-group relations, and that the best hope for achieving this lay in a process of education and the cultivation of good will among all sections of the community - a view stressed repeatedly through the debate - there were differences of opinion as to how, in the short term, complaints of racial discrimination should be investigated and what sort of action should be taken against those guilty of racial discrimination.

One school of thought favoured reliance on conciliation with recourse to civil court processes through existing courts as a last resort when the Commissioner **7** or an officer on the Commissioner's staff - was unable to effect a settlement through conciliation. The opposing view held that the Commissioner should be given powers for the gathering of evidence involving, where necessary, the use of legal compulsion for the disclosure of information and also powers for the institution of proceedings directed towards imposing penalties on offenders and providing redress for aggrieved parties.

Those who 'favoured reliance on conciliation argued that the legislation was breaking new ground in very complex territory. As one member put it:

> For the great majority of the Australian people, this legislation does break a new field. In our society there is a very strong body of opinion ... that we will not lessen the incidence of racial tension and racial discrimination by passing fairly stringent laws about it.

> So taking these factors into account, I think there is a case for saying that at the beginning we ought to adopt a rather soft approach as a first step.

He went on to say that it might well prove in the longer term that stronger legislation was necessary, but that as a first step a drastic and draconian approach was undesirable. Rather, as he put it:

> If this legislation is to have value the value is to be found in the consultation, the conciliation and the education provisions.[4]

The opposing viewpoint held that, while it might not be possible to change people's attitudes and moral values by legislation, nevertheless legislation served a very valuable purpose by defining rights and responsibilities between people. Though it might not change inward attitudes and beliefs, the application of the law could deter overt acts of racial discrimination and reduce the incidence of its more malignant and injurious expression. To achieve such effects the legislation must have force in the form of sanctions for breaches of its provisions and the Commissioner must have power to make investigations and to compel the disclosure of relevant information. In the absence of such sanctions and powers the legislation would lack 'teeth' and have no impact on offenders.

In the end, the conciliatory approach prevailed. Acts of racial discrimination which the Bill covered were declared unlawful but not offences. This was the emphasis underlying the Bill, and consequently the Commonwealth's endeavours were directed towards conciliation and education processes rather than towards prosecution and punitive action. The Bill, as finally passed, made the role of the Commissioner consistent with this emphasis. Such power as he was given was that necessary for the fulfilment of his conciliatory role. Since conciliation requires that the parties to a dispute be brought together for discussion and negotiation, the Commissioner was given the important power of being able to call compulsory

conferences. He could, where necessary, require the attendance at such conferences of:

(1) the person who lodged a complaint of an act of racial discrimination;

(2) the person who was alleged to have committed the act; and

(3) any other person whose presence at the conference the Commissioner (or a delegate empowered by the Commissioner to conduct such conferences) considered would be conducive to the settlement of the matter.

Failure, without reasonable excuse, to attend a compulsory conference when so directed rendered the person liable to a penalty of $250. In the interests of allowing free and open discussion, provision was made for the proceedings of such compulsory conferences to be privileged in that nothing said or done in the course of the conference could be used as evidence in any subsequent court action taken under the Racial Discrimination Act.

Should the Commissioner be unable to resolve the matter of complaint by conciliation, he could issue a certificate to the aggrieved party stating that a conference had been called and that he had been unable to settle the matter. The aggrieved party could then institute a civil action in a court of competent jurisdiction for one or more of a series of remedies specified in the Act.

The general thrust of the legislation is indicated by the following words which closed the debate on the Bill:

> A lot of people are opposed to a racial discrimination Bill. They believe that the law should not attempt to enforce morals in this area. Of course, it is true to say that the basic solution to discrimination lies with individuals. In the end the law cannot solve the problem at all; it depends on the people having the proper

> attitudes to one another and not allowing matters such as are referred to in this Bill to affect their decisions about people. In the end, one cannot legislate for morals.
>
> But at the same time the law has always had a part to play - the common law and the statute law - in embodying the moral attitudes of society. I personally believe that a racial discrimination Act, as this will now become, embodying as it does the aspirations of our society for attitudes that ought to exist between individuals in the society will, in the end, promote the proper relationship.
>
> However, that relationship has to be promoted in the right way. There is a passage in the New Testament about which I have always wondered where it is said that you ought to settle your differences on the way to court. In a way this Bill embodies that very concept. In other words, it attempts to settle the differences on the way to court. It is to be hoped that all those differences whenever they arise will be settled in accordance with the conciliation procedures that have been adopted and that are now being adopted by both sides of this chamber. I believe that that is the only way by which this problem can be solved. I hope the court will never hear a case. It is a great hope maybe a vain hope, but let it be the wish of all of us.

Although the Act puts the emphasis on conciliation as the means whereby complaints arising under its provisions were to be resolved, there is remarkably little in the legislation to indicate how the conciliation process should be conducted or what qualifications the officers empowered to conduct it should have. It allowed very considerable latitude to the Commissioner and those working with him in conducting investigations either informally or through compulsory conferences. It would seem that, in their wisdom, the legislators, recognising the very complex nature of the matters to be conciliated and the subtle and sensitive interpersonal issues involved, considered it advisable to leave the details of the conciliation process to the discretion of the conciliator, who could take into consideration the particular circumstances of the case.

On the matter of the qualifications of those who might be empowered to conduct investigations into complaints, the Act was silent. While it provided that a Commissioner shall be

appointed and allocated Certain powers and functions, it did not state what qualifications are required for a person to be so appointed. It was prescribed that the staff of the Commissioner should be persons appointed or employed under the Public Service Act 1922-1974 (Cw1th), but did not specify their number, qualifications or level of appointment. Such matters were left to be determined by negotiation between the Commissioner, when appointed, and the relevant government authorities.

The Racial Discrimination Act accorded the Commissioner the powers of a Permanent Head under the Public Service Act. It required of him that he should,

> as soon as practicable after 30 June each year, prepare and furnish to the Attorney-General, a report of the operations of the Commissioner during the year.

In turn the Attorney-General was required to

> cause a copy of the report to be laid before each House of Parliament within 15 sitting days of that House after the report is received by him.

The Commissioner was thus accorded very considerable autonomy and freedom of action in pursuing the objectives of the Act. His annual reports to December 1981 provide much of the material we will be considering. Insofar as this introductory chapter is concerned with the legislative provisions and the administrative arrangements made for giving effect to them, the following extract from the *Sixth Annual Report 1980.81* of the Commissioner is informative:

> It was...my responsibility when my appointment took effect as Commissioner to organise the ways and means for the implementation of the law.
>
> Following exhaustive discussions for many months previously with the Public Service Board and community representatives from all over Australia it was agreed that there should be a complement of 31 which provided for an organisational establishment in the Australian

Capital Territory, New South Wales, Victoria, Queensland, South Australia and Western Australia.

The whole concept was that there would be a small, dedicated team, properly distributed throughout Australia, who would be sensitive and active and above all, be imbued with a sense of mission. The advertisement for the staff went out throughout the whole of Australia on 20 December 1975. The response to those advertisements was to bring offers from many Australians outstanding in the field of human rights.

The establishment, approved by the then Attorney-General, Mr Enderby, and by the Public Service Board, was subject to further scrutiny during the period of the caretaker Government when Senator the Hon. Ivor Greenwood was Attorney-General of Australia. He examined the establishment and the proposals and approved them and so we went ahead with plans to put flesh on the skeleton of a law which had just been passed. A further development took place when Senator Greenwood was replaced and his successor, the Hon., now Mr. Justice, Robert Ellicott, was in fact to become the Minister responsible for the *Racial Discrimination Act.*

By a change in administration arrangements on 22 December 1975, the Hon. Michael Mackellar, the then Minister for Immigration and Ethnic Affairs, was made the Minister responsible for the Act.

In relation to staffing, the situation was disastrous. The staff consisted of a small team of four or five. As time went on the staff was built up and was eventually to number 12 and has never exceeded that number. The build-up, however, was purely temporary. Not one single officer at any level was in fact a member of the Office but simply on loan temporarily and there was no establishment.

The control of the Office went back to the Attorney-General in the person of Senator the Hon. Peter Durack, who continues to have the responsibility, and the Office remains suspended in limbo as far as establishment, staff, and continuity are concerned. This has been the position for six years while for most of that time there have been announcements made of the intention to establish a Human Rights Commission which would absorb the Office and therefore make any establishment superfluous.6

Soon after that report was written, the Human Rights Commission was established (on 10 December 1981), under the Human Rights Commission Act 1981. From that date the Commissioner has implemented the Racial Discrimination Act on behalf of the Commission, into whose office his staff were absorbed.

This report is primarily concerned with the approach to racial discrimination and its amelioration developed by the relatively small staff working with the Commissioner over the years from 1975 to 1983 when the study was made.

CHAPTER 1 ENDNOTES

1. The South Australian Parliament passed a Prohibition of Discrimination Act in 1966, which made racial discrimination a criminal offence.
2. Australia, House of Representatives, *Debates,* 1975, vol. 94, p. 285.
3. Hereafter, references to the Commissioner for Community Relations are, for ease of discussion, in the form 'he', 'his', etc.
4. Australia, House of Representatives, *Debates.* 1975, vol. 94, p. 1303.
5. ibid., p. 3250.
6. Commissioner for Community Relations, *Sixth annual report 1980-81,* AGPS, Canberra, 1981, pp. 76-7.

CHAPTER 2. THE CONCILIATION PROCESS

The Racial Discrimination Act 1975 was directed toward the elimination of racial discrimination by conciliatory means rather than by the imposition of punitive sanctions. It was hoped that this approach, in which the emphasis was on education and the cultivation of mutual understanding between the different sections of the population, would lead to changes in attitudes and behaviour that would make for equity in relationships and community harmony and co-operation.

In view of the significance given to it in the Act, the nature of the conciliation process will now be considered. An attempt will be made to differentiate conciliation from closely related processes; some guiding principles for the conduct of conciliation conferences will be outlined; and some innovative attempts to introduce conciliatory procedures into conflict situations will be reviewed.

The nature of conciliation

Braun defines conciliation as 'an attempt to settle disputes with the help of an outsider who assists the disputants in their negotiations'. He goes on to say 'Its sole objective is the settlement of a controversy by bringing the parties to voluntary agreement' .[1]

It is important to note the use of such terms as 'disputes', 'disputants', 'negotiations', 'controversy' and 'agreement'. For conciliation to occur there must exist a dispute between two parties who have an interest in negotiating a settlement. Where there is no dispute there can be no conciliation. This point may seem obvious but it needs to be made because the term 'conciliation' is sometimes used loosely to include interventions which would be more appropriately described as

intercessions. An intercession occurs when someone makes a representation on behalf of a person or group that has a grievance. Thus members of Parliament often make representations to government departments on behalf of one or more of their constituents. Such representation often results in action which resolved the grievance, but it would be a misuse of the language to describe it as conciliation.

Conciliation is involved when a dispute between two parties – the principals – is so intractable that they are unable to negotiate a settlement without the assistance of a third party whose role is to facilitate movement towards agreement. It has much in common with two other forms of intervention from which it may be distinguished. These are mediation and arbitration.[2]

To mediate means, literally, to stand in the middle, although the term 'mediation' is often used interchangeably with 'conciliation'. Mediation, in the strict sense, refers to the relaying of one party's position on the matter in dispute to the other party. 'Shuttle diplomacy', in which the principals do not make personal contact but convey messages to each other via an intermediary on possible solutions to their dispute, is an example of mediation. Mediation usually takes place without bringing the parties together physically. When it does involve a situation in which the principals come together with a mediator, the role of the latter is limited to facilitating the exchange of messages. In a sense the mediator acts as. agent for both parties in assisting them to get their messages through to each other. The mediator does not take control of the situation, define the rules of the interaction or bring in outsiders to influence the attitudes and behaviours of the principals. He assists by reflecting and at times reformulating the content of the messages being exchanged, helps to clarify the points at issue and remove misunderstandings and tries to ensure that the messages sent are the messages received.

Mediation is thus a relatively weak or mild form of intervention. It is employed in situations where the parties place considerable emphasis on their autonomy and resent any suggestions that others have a right to interfere in, or influence them in the management of, their affairs. For instance, mediation is the term typically used to describe attempts to settle conflicts or disputes between nations where national pride and sovereignty are of considerable significance.

In sharp contrast to mediation with its emphasis on the rights of the principals to determine the nature of the negotiations, and in particular to determine the terms of settlement, is the process of arbitration. Arbitration is

> the settlement of disputes through binding decision by one or more outsiders other than members of a court of justice acting in their capacity as official judges.[3]

The parties to the dispute may refer the matter voluntarily to arbitration or the reference may be compulsory in accordance with relevant legislation. In the former case there is an understanding that the parties will abide by the outsider's decision, which is termed an award. In the latter case, awards are final and binding by law.

To compare the process of arbitration with the processes of mediation and conciliation Braun groups them together and makes the following comments:

> In settling disagreements through arbitration, the terms of the peace treaty are fixed by the outside person or body, while under the mediation procedure the decision as to whether and under what conditions the dispute should be terminated is made by the parties themselves. The award rendered by the arbitrator is final and binding, the recommendation made by the conciliator may or may not be accepted by the parties. Under arbitration the controversy is adjusted according to the outsiders' views, under mediation to the parties' views. The award expresses the arbitrator's opinion as to the just and fair settlement of the issues submitted to him, while the recommendation of a conciliator must be largely based on

> considerations of expediency. A conciliator may recommend an arrangeable solution not in conformity with his personal concept of an equitable solution if he believes that, in view of the relative bargaining strength of the disputants or for other reasons, this arrangement would be most suitable to secure for some time stable relations between the parties. Though ... the arbitrator cannot completely disregard such factors as the relative economic power and the character of the parties, the grounds of his decision must be largely considerations of fairness and justice. Arbitration,. thus, is more judicial in character than conciliation. Procedural principles of the type governing the . activities of the courts are applied to a larger extent.[4]

Mediation and arbitration thus constitute two extreme positions in the intervention by an outsider in the process of helping the parties to a dispute to arrive at its resolution. In mediation the outsider has, at least in theory, no 'direct influence on the substance of the agreement. In arbitration the outsider determines the substance of the agreement. Between these two extremes lies the process of conciliation.

In conciliation, the outsider may go beyond relaying messages between the parties by contributing information and suggestions which may open wider possibilities for the solution of the dispute. He or she may encourage the 'parties to make compromises until they reach a point of agreement.

The conciliator may contribute ideas as to how the differences can be resolved. On their part the principals to the dispute may accept such suggestions *in toto* or they may reject them or they may use the suggestions as a basis for further discussion and in this way they may move toward agreement.

The conciliator becomes more involved in the relationships between the parties than does the mediator. Whereas the - latter is essentially a go-between, the former is more typically a conductor of negotiations. In mediation the parties tend to be separated and the exchanges impersonal whereas in conciliation the parties are usually brought together in face-to-face situations and the exchanges are likely to be highly personal and emotionally charged._: In

consequence, the conciliator is required to exercise more control over the interactions between the parties than is the mediator. There is a greater need to exert authority in respect of the manner in which the negotiations will be conducted. To carry out this task the conciliator convenes meetings between the parties at which attendance may be made compulsory, determines who is to attend such meetings and what matters are to be dealt with in them. He or she also has responsibility for ensuring that orderly discourse takes place at such meetings and that a social climate conducive to the settlement of the dispute is created.

We can thus note four separate levels of intervention by a third, or outside, party when an individual or group seeks such assistance in respect of some matter of concern arising from transactions with another party.

At the lowest or minimal level of involvement by the outsider there is *.intercession,* which typically takes the form of making representations on behalf of, or seeking information for, the party that has sought assistance. At this level no dispute exists as yet between the parties. The good offices of the outsider are being called upon to promote communication or clarify an issue.

At the second level of involvement by the outsider, there is *mediation* in which the outsider acts as a go-between to enable the parties involved to resolve the issue between them. It may follow on from an intercession when the second party responds to the representations or inquiries made, or it may occur when the outsider offers his or her services in an already well-established dispute.

At the third level there is *conciliation,* in which the outsider becomes involved in determining both the content and manner of conducting the negotiations but leaves the final determination of the terms of settlement to the disputing

parties. Conciliation may follow on from mediation when the latter proves inadequate for resolving the issues and it will almost certainly incorporate elements of mediation.

At the fourth level there is *arbitration,* in which the outside party - whether an individual or a panel constituting a tribunal - gives a ruling or award on the issue which determines the terms of settlement.

In legislation governing the settlement of disputes there is usually provision for the application of all levels of intervention on the basis that the higher levels are invoked only when the matters at issue cannot be resolved at a lower level. The three lower levels are often loosely grouped under the heading of conciliation. They are differentiated here to help describe differences in the way in which complaints from different sections of the population have been dealt with under the Racial Discrimination Act 1975. Throughout this report the emphasis will be on conciliation as defined above.

Conciliation procedure

As discussed above, the purpose of conciliation is not to resolve the dispute by an imposed decision, but to assist the parties to arrive at a mutually acceptable settlement. This means that the conciliator must exercise understanding, imagination and persuasive power to develop a common ground on which the parties can meet. The conciliator's role is not to assign blame or make judgements, but to adjust the conflicting interests in the most constructive manner possible. The first. aim of the conciliator must therefore be to understand the nature of those interests and to be sensitive to any hidden agenda or covert considerations which impede settlement. When it is clear where the interests of the parties lip, suggestions may be made which open up possibilities for compromise developed from ideas which are quite new to the principals.

Although conciliators cannot act in a manner contrary to law, they are not bound to follow procedural rules or codes. Their activities are not judicial in character. Their tactics are determined more by considerations of equity and expediency than by legal practice. The strength of the conciliation process lies in its informal and flexible character, which offers wide scope for the generation of diverse possibilities for the resolution of the issues. It is important that the parties be able to explore all avenues open to them for settling their differences.

For this reason it is not possible to lay down fixed rules for the conduct of conciliation. Effective conciliation calls for a good deal of improvisation on the part of the person who conducts it. Yet at the same time it is important that conciliation be conducted in an orderly manner and that it have some basic structure or be based upon some broad plan or strategy. Unless this is the case, there will be grave danger of arbitrariness and chaos in the meetings.

So while the detailed content and the moment to moment tactics should be left as open as possible to allow for adaptation to changing circumstances, it is important that there be some overall design to the proceedings. People who have submitted their dispute to conciliation in the hope of reaching an equitable and lasting settlement want to be sure that their case has been dealt with in an orderly, though not necessarily conventional, way. That is, they want to feel confident that the conciliator knows what he or she is doing and has some broad plan to which he or she is working. This confidence that the dispute is being dealt with in an orderly and systematic manner is a very important element in the facilitation of agreement. It helps to create a calm and dignified atmosphere which clears the way for the development of negotiations between the parties.

The position may be summarised by saying that there are broad principles which are common to conciliation in its different

forms and applications, and tactical variations which provide flexibility in dealing with the particular circumstances of the specific case. Some broad principles and some of the circumstances which determine tactical variations can be considered.

General principles of conciliation

The conciliator is attempting to promote communication and understanding between the participants and will conduct the meetings in accordance with the generally accepted principles of good interpersonal relations. This will mean being attentive to and considerate of the views of both parties, remaining calm and reasonable even though the climate of interaction becomes emotionally charged, and being clear and unambiguous in communicating his or her perceptions and thoughts.

Fisher and Ury, from their study of negotiation processes in a variety of situations and at levels ranging from family interaction to international disputes and settlements, have formulated four major principles as guidelines for negotiators and hence for conciliators who would attempt to influence and shape such negotiations:

(1) Separate the people from the problem. The aim is to change the parties from being antagonists to 'being joint problem solvers. This means changing the context from one of being a contest in which there is a winner and a loser with each party trying to score against the other to one in which the problem or issue is the focus of attention and the parties are, in metaphorical terms, seated side by side, working on the problem. The way to go about this is by being 'hard' on the problem or issue which must be thoroughly worked through, but 'soft' on the people by treating them as beings of good will and possessed of problem-solving resources who want a constructive outcome to the matter.

(2) In formulating the problem, focus on interests rather than positions. People take positions in disputes in order to satisfy their interests, but positions once taken tend to become rigid as the parties get locked into them and the negotiations become a contest with 'face saving' a major aspect. Pbsitions, in fact,

only partly represent the parties' interests, which are invariably very complex. The parties usually have many common as well as conflicting interests. By focusing on interests the problem may be opened up with new possibilities for its resolution emerging.

(3) Generate alternative suggestions for resolving the issue. The outsider is in a position to take a wider perspective on the matters at issue than are the parties. He or she may also have had considerable experience in conciliating similar disputes and may therefore be more aware of possible ways of resolving the matter.

(4) Encourage the use of generally accepted standards of just and fair dealing in the evaluation of proposed terms of settlement. The goal of conciliation is to arrive at a settlement that will be stable, that is, one that will be adhered to by the parties for a substantial period. This is unlikely to occur if a -settlement is reached which is unfair to, or does not meet the interests of, one of the parties.[5]

While the foregoing are general principles which would seem to hold for conciliation in its various applications, their detailed implementation in any given case will be influenced by the particular circumstances in which the conciliation is occurring. Although it is not possible to consider all situations which may affect their tactical application, some relevant variables can be considered.

Variables that affect conciliation tactics

The following factors may affect the tactics employed by conciliators.

Intensity of emotional involvement of the participants.

Conciliation may take place in a calm atmosphere with rational discourse or it may take place in a highly charged atmosphere where physical violence can easily be triggered. Experienced conciliators vary their intervention according to the emotional climate. In the calm and rational context they encourage a broad exploration of the issues by the parties while also leaving a lot of initiative to the parties. They

tend to act more like mediators being relatively inactive. At the other end of the scale, where the atmosphere is highly charged, they concentrate on the central issue and they become very active. The rationale is that while it is desirable that the parties work out their own solutions after a full airing of their differences, people who are highly charged emotionally are unable to handle or integrate many ideas and, if left to their own resources, will engage in an escalating confrontation that will get out of control.

Extent of the case load. When the case load becomes heavy the emphasis necessarily moves towards getting settlements in minimum time. Under such circumstances the conciliator can be expected to concentrate on those aspects which favour a quick settlement. Expediency is likely to become more relevant than equity. The existence of a massive backlog of some 10,000 cases waiting for formal hearings in the U.S. Equal Opportunity Commission seems to have influenced conciliation practice there.[6]

Whether the issues being conciliated are of a one-shot or a recurrent nature. One-shot cases are those in which the matter being dealt with is treated as an isolated event independently of other aspects of the relationship between the parties. Recurrent cases are those in which the relationship between the parties is a salient feature and the event under consideration is treated as one more manifestation - or symptom - of an unsatisfactory relationship. A dispute over the terms of termination of employment of an individual whose services are no longer required could be an example of a one-shot case. A dispute between a married couple over whether or not to adopt a child might be an example of a recurrent conflict that manifests itself in various forms of disagreement. In the one-shot case the emphasis is likely to be on achieving an equitable settlement in terms of the circumstances of the particular case. In the recurrent case the emphasis would more likely *be* on the relationship between the parties and on helping them to develop more effective ways

of managing their relationship. Attempts at changing relationships, or established patterns of interaction, whether between individuals or between groups are usually more time consuming and more demanding on the intervening third party than are the settlements of isolated incidents.

A matter of particular concern in this review is the situation in which disputes and conflicts arise as a function of the relationships that exist between different community groups. Insofar as disputes arise between persons because of their membership of different racial, ethnic, religious or other groups, we are dealing with recurrent cases. It is often argued that, in such cases, treating the disputes in isolation is ineffective. The first Australian Commissioner for Community Relations called such a practice a 'band-aid procedure[17] and the first New Zealand Race Relations Conciliator used the metaphor of an ambulance at the foot of the cliff instead of a fence at the top.[8] Both argued for attempts to change the interaction patterns between the groups by educational means.

During the last two decades there have been attempts by behavioural scientists to develop ways of opening channels of communication between groups in conflict. The hope in such studies was that improved communication might lead to changes in interaction between members of the opposing groups and point the way to the ultimate resolution of the conflict. While such attempts do not constitute the conciliation and settlement of specific disputes, they have features similar to those of the conciliatory process. The attempts in question consist of bringing together representatives of conflicting groups under the leadership or direction of a third party skilled in facilitating interpersonal communication.

Intergroup conflict amelioration. Several reports describing attempts to ameliorate conflict between opposing groups by bringing together representatives of the groups for concentrated encounters over periods ranging from a few days

to several weeks have appeared in the social science literature. The parties brought together include Greek and Turkish Cypriot officials[9], Ethiopian, Kenyan and Somali administrative and academic personnel[10], police and members of the community in the ghetto area of a major city in the south-west of the United States[11], police and black community leaders[12], Jews and Arabs in Israel[13], Irish Protestant and Catholic citizens from Belfast[14], and business executives and activists from community groups[15]. The aim common to all these projects was to help the participants to distinguish between productive and counter-productive approaches to conflict and to take some steps, however limited, towards implementing a productive approach.

The general principle underlying the design of these studies was that when groups in a state of friction come together to work for superordinate goals, they develop co-operative relations.[15] The need for mutual support and acceptance which becomes manifest in joint endeavours runs counter to expressions of hostility. One consequence is the humanisation of the image of the 'enemy' and a resulting change in the respective stereotypes each party holds of the other.

The superordinate task typically posed for the participants in such encounters is the finding of constructive ways of dealing with their conflict. That is, they are asked to approach the issues that divide them in the role of problem solvers.

In outlining the sequence of events that might be expected to occur in such attempts to bring groups in conflict together Lakin tells us that they might be expected to go through the following stages:

1. Participants express their pent-up resentments toward the other group, with consequent relaxation of some defences.
2. Each participant is directed to ask himself, 'What are my inner feelings and reactions to this interaction?' As each participant becomes a more

sensitive observer of his own modes of communication, he is able to listen better to his antagonist's point of view and to try to understand the latter's feelings.

The participant's increased understanding of his reactions to counter group members decreases the potency of his own group's stereotyped judgements. He comes to see his opponents as multifaceted individuals with unexpected feelings and attitudes.

4. A joint task helps bridge group barriers and reduces feelings of mutual estrangement. This vital stage in the process is contingent on the prior steps and the establishment of superordinate goals or 'making common cause' with the opposing group.-[7]

In this sequence the first step is the communication of the accumulated grievances and feelings of anger and hostility that the opposing parties hold towards each other. This seems to be a basic requirement in achieving some common ground in serious disputes and conflicts. If it does not take place, little progress can be expected. Once it has taken place the air is cleared for a more direct and rational approach to the practical issues involved in the conflict. The conflict must be recognised and confronted and not suppressed, denied or distorted. For this ventilation of grievances to take place and be listened to by the opposing party usually requires the presence of a neutral but active third party who ensures a fair hearing for both sides.

While the various workshops in conflict resolution are based on the same general principles and are alike in their broad strategy, there are many tactical variations depending upon the nature of the conflict and persons involved, the particular skills and orientations of those conducting the workshops, and such constraints as time, location, funding. For purposes of illustration the approach employed in one study - that involving police and ghetto residents in Houston, Texas[18], will be considered.

The design for this project was adapted from one initially developed for dealing with labour-management conflicts.19.

this design, after an initial general session in which the structure and rules for the project are explained, the parties separate to form sub-groups ('in-groups'), each made up of members of one side. Each in-group examines its own position and the way it ***sees*** its operations in relation to those of the opposing group. The objective is to make clear to itself and later to the opposing group what its intentions, purposes and goals are and what assumptions, attitudes and feeling exist among its members. The effect of this self-examination is expected to reveal that the members have rather less in common than they had believed and also to bring out more appreciation of the basis of the conduct and aims of the opposing group.

In the next stage the two opposing in-groups come together and exchange their perceptions of themselves and their opponents. These exchanges are expected to bring out new aspects which had not been taken into account. The workshop then splits again into in-groups to enable the members to absorb and digest the new input and to restructure their images of themselves and their opponents. The groups then come together again, with perceptions that should be mutually in closer accord than were the initial perceptions. The final step is to try to work out together some practical steps for reducing their conflict.

The rationale underlying the procedure is that as the parties bring out the bases for their behaviour, often revealing aspects hitherto hidden from or unappreciated by their opponents, the surface antagonism is diminished. This makes it easier to develop improved working relations. The thesis is that insight into one's own group leads to a more accurate perception of how it affects other groups, with consequent increase in empathy towards the latter and greater readiness to collaborate with them. It is moreover claimed that the procedure can be applied to any group conflict, however intense, provided that neither side is committed to a continuation of the conflict.

In the Houston study, a series of six-week workshops were conducted in which 1400 police and an equal number of community members took part. Each workshop had 200 officers and community members. Each person participated in one three-hour session a week over the six weeks. Sessions were run each day over a five-day week for forty officers and community members. The meetings were held in a neighbourhood community hall and at the police academy. Attempts were made to get a representative cross-section of the community, with particular attention to the inclusion of minority groups, poverty groups and dissidents. The police usually attended in uniform but outside their regular tour of duty. They received extra salary for their eighteen hours of participation. the group leaders, or 'trainers', were professional psychologists of doctoral level with considerable experience in group work. Funds for the project were provided by business and industrial organisations in Houston. Each six-week workshop cost approximately $20,000 in salaries for police and trainers and organisational expenses. Attendance by police was compulsory, but on the part of the community citizens it was voluntary.

There were, of course, variations in the perceptions of the opposing groups among the different members. The authors, however, provide us with composite stereotypes as representative of the respective perceptions:

> **Police Self Image.** As officers we are ethical, honest, physically neat and clean in appearance, dedicated to our job, with a strong sense of duty. Some officers are prejudiced but they are in a minority, and officers are aware of their Prejudice and lean over backwards to be fair. We are a close knit, suspicious group, distrustful of outsiders. We put on a professional front; hard, calloused, and indifferent, but underneath we have feelings. We treat others as nicely as they will let us. We are clannish, ostracized by the community, used as scapegoats, and under scrutiny even when off duty trying to enjoy ourselves. We are the blue minority.

> **Police Image of the Community.** Basically the public is co-operative and law-abiding, but uninformed about the duties, procedures, and responsibilities of the police officer. The upper class, the rich,support the police, but feel immune to the law and use their money and

influence to avoid police action against themselves and their children. The middle class support the police and are more civic-minded than upper or lower classes, the major share of police contact with the middle class is through traffic violations. The lower class has most contact with the police and usually are unco-operative as witnesses or in reporting crime. They have a different sense of values, live only for today and do not plan for tomorrow. As police officers we see the Houston Negro in two groups.

(1) Negro - industrious, productive,moral, law-abiding, and not prone to violence;

(2) 'nigger' - lazy, immoral,dishonest, unreliable, and prone to violence.

Community Self-Image. We lack knowledge about proper police procedures and do not know our rights, obligations, and duties in regard to the law. There is a lack of communication among social, geographical, racial, and economic segments of the community. We do not involve ourselves in civic affairs as we should, and we have a guilty conscience about the little crimes (traffic violations) we get away with, but are resentful when caught. We relate to the police as authority figures, and we feel uncomfortable around them. The black community feels itself second class in relation to the police. The majority of the community is law-abiding, hard working, pays taxes, is honest and reliable.

Community Image of Police. Some police abuse their authority, act as judge, jury and prosecutor, and assume a person is guilty until proven innocent. They are too often psychologically and physically abusive, name-calling, handle people rough, and discriminate against blacks in applying the law. Police are cold and mechanical in performance of their duties. We expect them to be perfect, to make no mistakes and to set the standard for behaviour. The police see the world only through their squad car windshield and are walled off from the community. Our initial reaction when we *see* an officer is 'blue' .21

An attempt was made to assess the effects of the project by means of a post-study questionnaire which was given to 800 police and 600 citizens. The citizens were much more enthusiastic than the police, who expressed a grudging to moderately good acceptance of the project. From the police point of view, the major gain was that the community got some

appreciation of the difficulties encountered by the individual police officer. There was also some reduction in prejudicial attitudes among the police. On the part of the community a common reaction was an increased appreciation of the police officer as an individual and as a human being.

Objective evidence of the effectiveness of such studies is rarely clear-cut. In this case the project was embarked upon in the fear that the racial riots which engulfed some other large cities (e.g. the Watts outbreak) would hit Houston. In fact there was no rioting in that city in the following year. But this was equally true of other large cities without such a program. Indeed, after the very turbulent years of the late 1960s in the urban ghettos of the United States, more than a decade of relative calm descended upon the country. In this particular case, an interesting index of gain was a drop of about 70 per cent in citizen complaints about police behaviour. There were also reports of changed behaviour on the part of particular police officers - that, for instance, officers would 'stop their squad cars to talk with black people in their neighbourhood for no reason other than to meet them' .[22] In one case a white police officer organised his own group of blacks and whites to continue discussion in his home. The project had its problems. Because the attendance of the community members was on a voluntary basis, it was inconsistent and this caused some discontinuity in the sessions. There were intrusive and abortive interventions by militants and dissidents, which raised the level of suspicion and defensiveness among the police. Some extreme right wing groups attended to take copious notes and write slanted articles about 'brainwashing'. Some police were not sympathetic and tried to sabotage the program. The demands on the resources of the leaders in handling very difficult groups were very heavy and many resigned from the project. About one-third of the leaders were minority group members and they seemed to enjoy a distinct advantage with both the police and community members.

seemed to enjoy a distinct advantage with both the police and community members.

Projects such as this Houston study do not constitute conciliation as such, but in their attempts to ameliorate relations between potential disputants they have much in common with it. Essentially both conciliation and conflict amelioration are methods of softening the boundaries between individuals and groups and making them more permeable so that constructive interaction can take place and new alliances with superordinate goals can take shape. In effect, such attempts at conflict amelioration are educational extensions of the conciliation process.

The central point of this chapter has been that conciliation is a process in which a third party intervenes in a dispute between two principals with a view to helping them to arrive at a mutually satisfactory resolution of their differences. It is an intermediate process, between acting as a messenger or go-between and acting as an adjudicator imposing a solution the parties are obliged to accept. It involves the conciliator in setting the stage for the interaction between the contending parties and determining the rules that will apply in their negotiations.

Conciliation is often employed in a context of dispute settlement where failure to achieve a resolution by this means opens the way for the referral of the matter to an arbitrating body or tribunal which has the power to make an award which will be binding on the disputants. In such a context there may be occasions where for good reasons (e.g. for purposes of equity where there is great disparity in the power of the disputants or where it is desired to establish a precedent) the intervening third party may wish to get the matter before a tribunal rather than assist the parties to settle it between themselves.

It is not my purpose to question the merits or otherwise of such a course of action. I would merely point out that it would not conform to the requirements of our definition. It would not be a case of helping the parties to settle their dispute on the way to court. It would not be conciliation.

CHAPTER 2 ENDNOTES

1. K. Braun, *Labor disputes and and their settlement,* rev. edn, Johns Hopkins, Baltimore, 1955, p. 53.

2. See Appendix for further discussion of the terms 'mediation' and 'conciliation'.

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19. R.R. Blake & J.S. Mouton, 'The intergroup dynamics of win-lose and problem solving in union management relations', in M. Sherif ed., op. cit.,pp. 99-140; R.R. Blake et al., 'Union management intergroup laboratory: strategy for resolving intergroup conflict', (1965) 1,1 *Journal of Applied Behavioural Science,* 25-57

21. R.L. Bell et al., op. cit., p. 244.

22. ibid., p. 246.

CHAPTER 3. THE NATURE OF THE TASK

The Racial Discrimination Act 1975 imposed on the Commissioner for Community Relations the task of eliminating, so far as was possible, all forms of racial discrimination. In doing so the Commissioner was to rely primarily on the use of conciliation in the settlement of matters giving rise to complaints of discrimination and on education as a means of changing community attitudes and practices in regard to race relations.

Critics of the Act decried the lack of powers available to the Commissioner for its enforcement. Thus Kelsey maintained that the methods of enforcement provided were quite inadequate to the task to be performed.' In his view what was required was a change in the power structure which would involve the inclusion of minority groups in the process of decision-making rather than reliance on inadequate procedures for the settlement of individual complaints. A less radical criticism was offered by Jayasuriya, who stressed the lack of penal provisions and punitive clauses and the absence of even basic investigatory powers.[2] He took the view that in raising expectations which could not be fulfilled owing to lack of enforcement powers the Act would result in frustration and anger. He foresaw that both the victims and the potential discriminators would come to conclude that it was a token gesture which was not to be taken seriously.

Aware of such criticisms, the first Commissioner for Community Relations decided that only by the most earnest application of the provisions of the Act could its potentialities be demonstrated and its weaknesses revealed. On this basis he applied himself, and the resources available to him, to the implementation of the Act to the limit of his powers. In accordance with the legislation and the sentiments expressed

by the legislators, the Commissioner and his staff undertook, from the beginning, the two functions of:

1. settling complaints of racial discrimination by conciliatory means; and

2. developing harmonious community relations through educational programs.

The two functions were complementary. It would be easier to settle complaints of discrimination in a community where relations between the groups are predominantly harmonious than in one where they are characterised by conflict and hostility. By the same token, the conciliation process, when conducted effectively and leading to a meeting of minds, offers great scope for experiential learning of considerable potency for the participants in the dispute. Together they offer potential for creating harmonious relationships among racial and ethnic groups.

For conciliation to take place it is necessary to have a complaint. Table 1, prepared from the Commissioner's records, shows the number of complaints per financial year over a period of almost eight years from the commencement of operations

Both the number of complainants and the number of matters - the situations giving rise to the complaints - can be seen to have increased up to the year 1979-80. In the year 1980-81 the number of matters continued to rise, but the number of complainants fell. Changes in the counting procedures occurred in subsequent years with the advent of the Human Rights Commission. Records were no longer kept of the number of complainants joined in each matter. Also, some complaints which would previously have been counted in the Commissioner's statistics came to be listed as human rights complaints.

TABLE 1

	Complainants	Matters (a)
1975-76 (8 months)	359	(b)
1976-77	622	(b)
1977-78	861	500
1978-79	976	628
1979-80	1394	716
1980-81	904	742
1981-82		635
1982-83		512

(a) Situation giving rise to the complaint.

(b) Not available.

Source: Commissioner for Community Relations.

The complaints cover a wide spectrum of issues and include derogatory remarks about race or nationality, refusal of service, discrimination in respect of housing or employment, and harassment by neighbours, government officials or police. The Commissioner's reports to the end of 1981 list briefly each complaint and its outcome; an excerpt from the 1980-81 report (Table 2) provides a cross-section of the complaints received.

It is apparent from this extract that complaints of racial discrimination arise more frequently in respect of the treatment of Aboriginal people than in respect of any other racial or ethnic group. Although they comprised some one and half per cent of the Australian population, in 1980-81 they lodged in the vicinity of 40 per cent of the complaints. (Table 3).

TABLE 2

Race/Ethnic Group	*State! Territory*	*M or C Respondent*	*Complaint as stated*	*Outcome*
Aboriginal	NSW	Police	Aboriginal who was drunk staggered into police officer. Police officer handled him roughly and at the police station struck him in the back of the head with a closed fist. Another Aboriginal was told that he would be shot if he was ever found drunk again	Incident reported in person to Inspector of police by officers accompanied by an Aboriginal leader. Matter taken into account by defence counsel Referred to NCDEO.
Aboriginal	Qld	Community Council	Dismissal	Resolved after conference with councillors
Aboriginal	Qld	Community Council	Direction to leave Song which appears to	Resolved. After discussions an extension of time was sought and agreed to Inquiries initiated
Yugoslav	NSW	Doctor	Alleged medical malpractice	Referred to NCDEO. Continuing
Asian	NSW	Employer	Unjust dismissal	Lapsed. Further details not provided
Aboriginal	Qld	Picture theatre	Harassment	Services are private and therefore there is no obligation or agreement to carry out Telecom business
Aboriginal	NT	Cattle station	Refusal to deliver telegrams to Aboriginals	Property sold and an alternative site was acquired
Aboriginal	Qld	Council	Community objection to proposed establishment of an Alcoholic Rehabilitation Centre on a property	Continuing
Ukranian	NSW	Government Office	Discrimination through imposition of penalty without reasonable explanation	Referred to appropriate authority. Continuing
Indian	Vic	• Employer	Discrimination in employment	Inquiries initiated. Directions to attend compulsory conference have been issued
Aboriginal	Qld	• Radio stations	ridicule Europeans	No unlawful act
European	NSW	• Newspaper	Discriminatory article	No unlawful act
Indian	NSW	• Hotel	Refusal of service	**Inquiries** initiated.
Aboriginal	NSW	• School	Discriminatory practices	Continuing
Not stated	Qld	• Agents for landlord	Inadequate service by landlord's agent	Complainant has asked for action to be deferred pending direct action by him
Aboriginal	Qld	• Newspaper	Discriminatory remarks by journalist	Resolved after discussion with agent
New Zealand	NSW			No unlawful act

Source: Commissioner for Community Relations, Sixth Annual Report 1980-$1, AGPS,-Canberra, 1981, p. 102.

TABLE 3

	No. of complaints relating to Aboriginals	No. of other complaints	Total N of complaints
New South Wales	91	164	255
Victoria	19	179	198
Queensland	186	42	228
South Australia	4	26	39
Western Australia	54	46	100
Tasmania	1	7	8
Northern Territory	26	10	36
Australian Capital Territory	7	59	66
	388	533	921

Source: Commissioner for Community Relations, Sixth annual report 1980-81, AGPS, Canberra, 1981, p. 51.

It can be seen from Table 3 that Victoria had comparatively few complaints from Aboriginals in comparison With those from other groups. This presumably was attributable to the relatively small numbers of Aboriginal people in that State and to the large ethnic communities of European origin in Melbourne.

Table 3 also shows that in Queensland the figures were broadly the converse of those for Victoria. Queensland has a comparatively large Aboriginal population. Furthermore, the policies pursued by the Queensland Government have been less favourable to Aboriginal people than those pursued by other States on the eastern seabord.

The total numbers of complaints for States and Territories other than New South Wales, Queensland, Victoria and the Australian Capital Territory were relatively low because the Commissioner, as a matter of policy in making the best use of his limited staff, confined the activities of his Office largely to the eastern States.

The high incidence of complaints of racial discrimination in respect of Aboriginal people was foreseen in the debate during the passage of the legislation. Indeed, for some speakers the term 'racial discrimination' seemed to be virtually synonymous with discrimination against this section of the population which has been the victim of oppression through nearly two centuries of white occupation. The relative severity of discrimination against Aboriginals is reflected not only in the proportion of complaints coming from them but also in the comparative difficulty in settling the issues that give rise to the complaints.

Dealing with complaints

When a complaint is made of racial discrimination, steps are taken to inquire into and, where possible, to settle the matter. We can note four levels in this process. At the simplest level, on inquiry it is found that the act complained about is not prohibited by the Act. It may, for instance, be that there was in fact no discrimination. In other words, the complainant received exactly the same treatment as any other members of the community would have received. It may be that critical or derogatory statements were made about the race or ethnic group of the complainant, but these have not been prohibited under the Act. It may be that there was some misunderstanding on the part of the complainant of the nature of the act that was the subject matter of the complaint. In such cases the matter is usually dealt with by advising the complainant of the situation, and the issue is closed.

At the next level of difficulty, it emerges on inquiry that the complainant has grounds for complaint, but the matter can be resolved by informal means. For instance, officers may inform the respondent of the situation and the respondent may take appropriate steps to remedy the matter. Or the parties may come together informally with the conciliator and work out a solution to their dispute.

At the third level, the Commissioner (or his or her delegate) has the power to call a compulsory conference for the purpose of settling the matter of the complaint. This power is resorted to when settlement by less formal means seems unlikely. C'Nrer the period from 1975 to 30 June 1984, a total of eighty-five compulsory conferences were called. The following excerpt from *Community Relations Paper No. 11,* issued by the Commissioner in April 1981, conveys something of the nature of compulsory conferences:

> The largest number of compulsory conferences under the *Racial Discrimination Act 1975* have been convened in New South Wales country towns. Compulsory conferences bring complainants and respondents together and afford to each a measure of protection ... not available in informal conferences. They are an effective means for resolving complaints and bringing respondents, often for the first time, to the table with Aboriginal people. They are a means for educating those with power that they are not above the law and that Aboriginal people have rights under the law for the first time in 200 years.[3]

Finally, when the matter of complaint cannot be settled by a compulsory conference, the aggrieved parties may take their case to a court of competent jurisdiction for redress of their grievances. This, however, can only be done after obtaining a certificate from the Commissioner for Community Relations stating that he has convened a compulsory conference and that at the date of the certificate the matter has not been settled.

The issuing of a certificate is the most extreme measure the Commissioner can take in the settlement of complaints. It is

a measure of some moment for it exposes the parties - more .particularly the respondent - to the costs and stress of court action. It is understandable that the parties generally prefer to settle the matter before it reaches this stage. The following brief report, taken from Community Relations Paper No. 11 of April 1981, indicates the type of transaction that may occur in more difficult cases:

> **Complaint as stated**
>
> **Hotel**
>
> Four Aboriginals sought service in a hotel. The Publican said they could have one drink and then they would have to leave. When the men protested, the Publican told them to leave or he would call the police. Inspector of Police was in the hotel office at the time and became involved in the discussion. He allegedly supported the Publican and would not listen to the Aboriginals' point of view.
>
> **Outcome/basis of settlement**
>
> Compulsory conference held. Directions to attend were issued to Publican, the Inspector of Police, complainant, witnesses and a member of local Consultative Committee on Community Relations. Respondent, who did not attend, and Inspector advised that the matter to be dealt with at compulsory conference was *sub judice* because of a charge of unseemly words against one of the complainants. Summons relating to this charge had been served in the late afternoon of the working day prior to the conference. A second compulsory conference was called which all previous parties, except the complainant charged with unseemly words, were directed to attend. Publican left the conference unexcused claiming the matters to be discussed were *sub judice.* Inspector was excused from the conference with the consent of the complainants for the same reason. The conference failed to settle the matter. A certificate under the RDA 1975 was foreshadowed. Senior counsel had advised on the challenge. At the request of the principal complainant, officers settled the matter between the parties on the basis of the payment of $1,000. Further action by the Commonwealth against the respondent for non-compliance with a direction to attend a compulsory conference was discontinued in the consideration that the matter had been settled.[4]

During the period to 30 June 1984 a total of thirty certificates involving fifteen matters have *been* issued.

(A separate certificate is issued to each person where two or

more are joined in a complaint, as in the above case.) These involved complaints against public service departments, hotel licensees and real estate agents.

Since such a high proportion of the complaints of racial discrimination came from members of the Aboriginal community, and since recourse to the more coercive procedures for effecting settlement has been almost entirely restricted to cases involving Aboriginals, it is clear that the most stringent tests of the efficacy of the Act occur in the area of relations between the Aboriginal and non-Aboriginal groups. It is here that the conciliation process comes under the most severe challenge. The strengths and limitations of the legislation and the procedures used to implement it are most likely to be found by examining their operation in this seemingly intractable area of community relations.

But, before taking up the matter of combating discrimination against Aboriginals, the situation of the non-Aboriginal ethnic communities with respect to the problems they encountered, the complaints they made and the way in which the provisions of the Act were used to ameliorate their position will be considered. Although Aboriginals were disproportionately over-represented in the proportion of complaints, some two-thirds of the total number of complaints emanated from members of the 'ethnic' communities. The nature of these complaints and how they *were* dealt with under the Act will be examined in Chapter 4.

CHAPTER 3 ENDNOTES

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2. D.L. Jayasuriya, 'An analysis of the Race Relations Bill.', (1976) 2,9 *Identity,* 31-3, 36.

3. Commissioner. for Community Relations, *Discrimination against Aboriginals in country towns of New South Wales,* (Community Relations Paper 11), Office of the Commissioner for Community Relations, Canbera, 1981, p

4. ibid., p. 39-40.

4. DISCRIMINATION IN RESPECT OF ETHNIC COMMUNITIES

On 28 June 1983 this letter appeared in the *Canberra Times:*

> Sir, - May I contribute to the discussion on multi-culturalism in Australia in the light of comments that have been circulating recently.
>
> One gets the impression that the so-called 'dinkum Aussie' is beginning to thin out in the ranks and that the Anglo-Saxon dominance may be weakening. This is due to the increasing number of non-Anglo-Saxons in the community and is influencing the attitudes of Australians.
>
> We recognise the fact that the Aborigines were here before us, but as Anglo-Saxons have been the dominant population (since about the 1830s, when the European population exceeded the native population), we have been traditionally regarded as 'the Aussies'.
>
> We should not be ashamed of thinking of ourselves in this light, as those of Anglo-Saxon descent have made this country what it is today. As a fifth generation Australian whose grandfather was a 1915 Anzac, I deplore the moves to 'dilute' our heritage, which is a very strong feature of this country.
>
> To quote from *They're a Weird Mob,* written 25 years ago, 'There are far too many New Australians in this country who are still mentally living in their homelands, who mix with people of their own nationality and try to retain their own language and customs, who even try to persuade Australians to adopt their customs and manners. Cut it out. There is no better way of life in the world than the Australian. I firmly believe this.'
>
> Returning to one aspect of the situation in 1983, the arguments so far advanced to alter our national language with a view to accommodating non-English speaking migrants are unconvincing and will bring about confusion, resentment and division in Australia. We have abundant evidence of the success of ethnic pressure groups in persuading us that we should adapt to their needs. When prominent academics and educators take up the cry, people start to believe the story.

> Finally, I would like to support P. and R. - (Letter, February, 13): May we get this off our chests, for all the letters that make us feel the Aussie is a dying race?
>
> W.14.....

This letter is quoted as an introduction to the problems confronted by members of the 'ethnic' communities, the attitudes with which they have to content and the task undertaken by the Commissioner for Community Relations in trying to promote an open society willing to accept diversity and change in its life patterns. To the extent that it argues for a closed monolithic and static culture and society to which newcomers to the country must adapt and conform, it ignores their very human social and emotional needs.

The term 'ethnic' derives from the Greek *ethnos,* meaning nation or folk, and refers to the folk ways - the customs, values and traditions - accepted among the particular group. In this sense we are all ethnics. But the term as commonly used in this country has come to denote all those, other than Aboriginals, who have not, for any one of a number of reasons, become relatively indistinguishable in their beliefs, language, lifestyles or related characteristics from such people as the writer of the above letter. 'Ethnics' may be recent arrivals from the United Kingdom or third or fourth generation Australians living in the Chinatowns of our capital cities. They may be members of national groups - Greeks, Italians, Germans - seeking to preserve some aspects of their customs and culture. They may be people who subscribe to a particular set of religious beliefs.

The relevance of ethnicity in Australian society in the closing decades of the twentieth century has been brought out in a paper published by the Commissioner for Community Relations .[2] There it was pointed out that in the thirty years to 1975 some 3.5 million people came to Australia, by 1975 anyone who was alive in Australia at the time of World War II

was in a minority and 40 per cent of all Australians were a product of post-war migration. The 3.5 million new arrivals 'came from 140 different ethnic backgrounds speaking 90 different languages and practising 40 different religions'. They had formed more than 2300 ethnic organisations dedicated to ethnic pluralism by maintaining their original culture and had established some hundreds of schools in which some 100,000 children received training in 'their original language, culture and traditions while also attending Australian state or independent schools'. This massive influx, resulting in something of a demographic revolution, has been accomplished in a remarkably peaceful way, which says much for the resourcefulness and basic good will of both the new arrivals and the receiving population. There has been a relative absence of riots or communal conflict or strife.

This, however, is not to say that all has been sweetness and light in the incorporation of the newcomers into the Australian population. For many the process of establishing themselves in their new land has been an arduous struggle to overcome difficulties arising directly or indirectly from their ethnic status. While overt hostility and communal violence were largely absent from relations between the different sections of the Australian society, there was on the part of the more established sections of the population little appreciation of, or sympathy with, the situation in which members of the different ethnic groups found themselves. For • the most part, it was blandly assumed that the newcomers would move quickly into the workforce, acquire fluency in the language and adopt the prevailing manners and customs.

In attempting to understand the nature of the contribution made by the Racial Discrimination Act 1975 in ameliorating the disabilities suffered by the ethnic communities, we can begin by considering the subject matter of the complaints made to the Commissioner and in particular how these complaints compared with those made by members of the Aboriginal community. As has already been noted, the Aboriginal people

not only account for a disproportionately large share of the complaints, but also account for virtually all those complaints which require the use of the powers available to the Commissioner for their resolution. We might therefore ask if there are any features which distinguish the content of complaints by members of the 'ethnic' groups from the matters raised in Aboriginal complaints.

Trlin reports that when the subject matter of each complaint was examined and classified:

> ...the pattern for each of the two ethnic categories was different.. .In comparison with 'Other' [i.e. 'ethnic'] complainants the percentages of Aboriginal complaints accounted for by Sections 9 and 15 were much lower and the percentages for Sections 11 (access to public places, facilities), 12 (land, housing) and especially 13 (provision of goods and services) were much higher. Indeed while accounting for only 31.5 percent of all complaints [in his sample], Aborigines accounted for 95.8, 75.0 and 64.6 per cent of the complaints under Sections 11, 12 and 13 respectively. Overall, these findings could lead one to the conclusion that Aborigines are more likely to experience discrimination at the hands of 'gatekeepers' such as hotel managers, landlords and other business proprietors. To temper this conclusion, however, it must be acknowledged that members of other ethnic-groups may have avoided such discrimination by patronising businesses owned and operated by members of their own groups in the major metropolitan areas.[3]

It would seem that, as compared with Aboriginal people, it is comparatively rare for a member of one of the ethnic communities to experience the unambiguous and insulting confrontation of being refused entry to public places and facilities, access to land or housing, and provision of goods and services because of his or her ethnic identity. Since such refusals constitute the most extreme forms of racial discrimination and reflect the most intractable racist attitudes, it can be said that such discrimination as has been encountered by ethnic communities has been of a less extreme form and presumably more responsive to intervention procedures than that applying in respect of the indigenous people.

When we turn to those complaints which have disproportionately high frequencies among the ethnic groups we find that, on Trlin's calculations, some three-quarters fall under s.9, which, as he puts it, 'is distinguished by its very broad application'. This section makes unlawful any act which involves

> a distinction, exclusion, restriction or preference, based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any field of public life.

That is to say, some three-quarters of the complaints are based not on deeds which clearly constitute infringements of specific provisions of the Act but rather on more general and less clearly defined issues of human rights. Of the remaining complaints he found that approximately half fall under s. 15 which, in Trlin's summary account, makes it unlawful to 'discriminate in the hiring, dismissing, promoting, providing of training opportunities or setting of work conditions for employment'.[4]

It is usually difficult to establish bias or discrimination in employment matters. Many variables may be salient in determining such matters as dismissal, hiring, promotion or training. They include the qualifications and performance of the individual, the merits of others who are competing for the position or promotion and the special requirements of the duties to be performed. Complaints under s.15 are, therefore, like those under s.9, more likely to prove difficult to establish as being based on racial discrimination.

In effect, if we accept Trlin's classification, in over 85 per cent of the complaints emanating from members of ethnic communities, there is likely to be some difficulty in establishing that an unlawful act of racial discrimination took place. To the extent that conciliation is undertaken

when preliminary inquiries indicate that an unlawful act of racial discrimination has occurred, it would seem that there has been relatively limited scope for its application in respect of grievances arising among ethnic communities. This does not mean that the complaints emanating from members of ethnic groups are groundless. It means only that they do not lend themselves to conciliation under the. Racial Discrimination Act as we have defined conciliation in

Chapter 3.

Nature of complaints

From an examination of the annual reports of the Commissioner for Community Relations it appears that complaints made by persons of ethnic background largely do not proceed to conciliation for one of the following reasons:

1. the complaint is based on an occurrence which is not unlawful under the Act; or

2. inquiries indicate that the occurrence complained about did not involve racial discrimination; or

3. the matter complained about is settled to the satisfaction of the complainant without the necessity of proceeding to conciliation.

Occurrence not unlawful under the Act

Not all behaviour which reflects racist attitudes has been made unlawful by the legislation. The most obvious exceptions are expressions of a derogatory and insulting nature made by individuals or organisations, and offensive references to racial or national groups in the media. These figure very prominently in the grievances of members of ethnic groups. The Commissioner's report for 1980 stated:

Salient features of the community relations scene in Sydney during the past year have been:

- Intensive propaganda campaigns in the suburbs by racist organisations, including the widespread distribution of fake letters purporting to emanate from the Sydney Office.
- Outbreaks of brought about by some suburban. newspapers publishing offensive material based on race or birthplace.
- Neighbourhood disputes marked by racist name7calling.[5]

Racist name-calling occurs in a wide variety of situations. It probably occurs most frequently in neighbourhood disputes,but complaints have been made of its use by teachers in addressing pupils and by police in interrogating suspects. Related behaviour of an offensive nature includes racist jokes, advertisements which depict particular groups in undignified ways, and media reports which identify by the use of ethnic and racial terms individuals involved in police inquiries and criminal charges. However, unless the racist expressions give rise to physical acts that infringe the safety or rights of others, they do not constitute unlawful acts.

In the framing of the legislation, in deference to the right of freedom of speech, the use of derogatory terms and the making of statements which are offensive to particular groups were not prohibited. Legally, the Commissioner has had no power to act in respect of complaints in this area. That he has in practice made representations to those who cause offence in such ways - and often succeeded in having remedial action taken - reflects his concern for the feelings of the people involved and his commitment to the cause of harmonious community relations.[6]

Not racial discrimination

Apart from acts of a discriminatory nature which are not unlawful, a number of complaints arise from occurrences which

do not involve racial discrimination. These can be noted in the tabulated case lists included in the Commissioner's reports to 1981. Thus a person of Welsh background alleged 'victimisation and denial of entitlement to war pension and repatriation medical services' against a Commonwealth department. Inquiry revealed that this person was 'ineligible for benefits as former merchant seaman'.[7] In another case a person of Italian origin lodged a complaint against 'Australian and overseas governments' on the grounds that 'acceptance of Australian citizenship led to loss of compensation from former country'. The finding was that this was 'not racial discrimination'.[8]

It would seem that in a substantial number of cases the event complained about occurred for reasons other than racial discrimination. When this became apparent at the initial inquiry stage the complainant would be advised and the matter closed. From the viewpoint of the Commissioner the important issue in all cases was that the complaint should be taken seriously and investigated in order that the complainant might be satisfied that the matter had received full consideration.

Matters settled by minimum intervention

In many cases where the complainant has a grievance that is covered by the legislation, only minimal intervention is required to settle the matter. While accompanying two officers from the Human Rights Commission on a field trip in 1982 I observed such a case. We visited a Sikh community in a small provincial centre in respect of some matters which had been raised on previous field trips. After these had been attended to and in the course of some social exchanges, one of the young men in the community raised the question of the difficulty some recently arrived wives of community members had in passing the test to obtain a driver's licence. This man, who had grown up in Australia, had, like some others in the community, recently gone back to the Punjab, where he had

married and he had then brought his wife to Australia. She was not fluent in the English language and had difficulty in passing the test on the rules of the road, even though she knew them well, because the test was administered in English. Since provision has been made for persons whose native language is not English to take this test in their mother tongue in the case of many European languages, the young man wondered whether it would be possible to arrange for such new arrivals from India as his wife to take this test in a language with which they are familiar.

The officer listened attentively and suggested to the man that he take the matter up with the local inspector of police. He told him that if there was any difficulty in the matter the Commission would take it up, but in the first instance, in the interests of good community relations, it would be better if the necessary arrangements could be made locally without intrusion from outside. The man seemed quite happy about this and said he would discuss the matter with the inspector. As we left, the officer commented,

> There you have an example of the genesis of a complaint. If it is necessary we will take the matter up, but [the Sikh in question] is a very able young man who is quite capable of handling the matter tactfully with the police. We encourage people to resolve their own problems and we refrain from interfering as far as possible consistent with our responsibilities. We see this as having developmental value for the individual and for the community.

In this case the Sikh had the right to ask for the test to be taken in the language of the applicant. No doubt the failure to make provision for this was related to a lack of

demand for it in the past. No doubt too there would be some minor inconvenience in making arrangements in a provincial centre for the testing of applicants for driving licences in a language that is not widely used. The matter, however, was obviously one that could be settled by reasonable people working together.

Discussion with staff of the Commission indicates that many complaints are resolved at a level which in terms of our definitions in Chapter 3 would be called intercession or mediation. Much of this work is done by telephone with little or no face-to-face contact between the parties. Only in comparatively rare instances is it necessary to convene a conference between the parties to conciliate a dispute. Nevertheless, such action is taken when the occasion warrants it; for example:

> A Melbourne firm dismissed an employee of Indian origin after five and a half years of what must have been very satisfactory work, judging by the glowing references they gave her. She maintained that the dismissal was caused by her racial origin. A compulsory conference was called, as a result of which the firm paid her over $3,000 compensation, the equivalent of three months salary.[9]

Persons of Chinese, Vietnamese and Indonesian origin complained against a Commonwealth department on the grounds of discriminatory treatment of Asian residents by officers apprehending illegal immigrants expressed prejudice against Asians and infringed rights. The action taken was

> Compulsory conference convened: Departmental officers regretted causing offence, gave assurances that racial prejudice was not involved, and agreed to avoid similar actions giving rise to offence in future. Issues raised at compulsory conference to be brought to notice of Department by officers.[10]

Conciliation of disputes not a major issue

It would seem that despite exceptional cases such as the two referred to above, the conciliation of disputes has not played a major part in the work of the Commissioner and staff in relation to the ethnic communities. However, this does not mean that the Commissioner has not made a major contribution to amelioration of the conditions for new arrivals in the country and to the cause of community relations generally. Since this contribution has relevance for the reduction of

conflict and the development of amicable relations - causes intimately related to those of conciliation - we will look at some ways in which the Act and its implementation have promoted the well-being of ethnic groups.

The contribution to the ethnic communities

A discussion of the contribution made by the Racial Discrimination Act to community relations must begin with the person of the first Commissioner, Mr A.J. Grassby.

Lively and dynamic, and with a taste for the colourful, Grassby had a keen interest in, and feeling for, the diverse community groups that had formed in Australia by the mid 1970s. A former Member both of the New South Wales Parliament and the House of Representatives of the Australian Parliament, he was Minister for Immigration in the Labor administration in 1973-74 and had become very familiar with the situation of newcomers to the country and with the difficulties with which they had to contend. His interest in the ethnic communities had, moreover, preceded his involvement in political matters. His early career had included journalism, but for the greater part of his working life prior to entering Parliament he had served in the Commonwealth Scientific and Industrial Research Organisation as the executive officer of a special extension service. In that capacity his task was to facilitate the adoption in agricultural practice of scientific techniques developed in the laboratories and research stations. Since it has long been known that the adoption of innovations in agricultural and similar areas is highly dependent on the social network and is inhibited in communities where there are barriers to communication, Grassby took a keen interest in community relations and particularly in members of ethnic groups that were coming to play a prominent part in his region. He developed the first multi-lingual extension program in Australia. In thus serving agriculture through the promotion of innovation he became associated in working relationships with a cross-section of members of ethnic

communities and at the same time was engaged in the complex and challenging task of modifying beliefs, attitudes and practices relevant to technological change.

It is hardly surprising, therefore, that as Commissioner for Community Relations he set as his first priority the changing of community attitudes - more particularly those of the established English-speaking section of the community - by educational means. To this end he made use of all resources available to him including use of the media, public addresses, participation in the training of persons having contact with the public (police, teachers etc.), and the organisation of programs for special target communities. A detailed discussion of the activities of his Office in the sphere of education for the elimination of racial prejudice is, however, beyond the scope of this review, which is concerned with the conciliation of complaints.

Grassby's policy was to integrate, as far as possible, the conciliation of complaints with the educational program. In the case of the Aboriginal community, where there were many complaints that required conciliation, this policy, as we shall see, worked well. In the case of the ethnic communities, however, the complaints tended more often to reflect the operation of institutionalised procedures which were discriminatory in their consequences rather than unlawful acts on the part of individuals. In these circumstances it often proved more appropriate to work for institutional change, that is, change in the rules and procedures that impinged adversely on members of the ethnic communities. In effect those complaints which reflected racial discrimination within the mean of the Act could, in many cases, be treated as symptoms of discriminatory but institutionalised procedures. The Commissioner's reports consistently call attention to such procedures and seek their amendment. Some examples follow.

Non recognition of qualifications obtained overseas

> ...a surgeon dentist who had served for 21 years as a dentist in the Armed Forces of his country of origin. He stated that this past experience was not considered by the Dental Boards of Australia, especially in two States where he applied personally and unsuccessfully.
>
> In one, he took an examination which he considered to be very difficult not because of the content but because it was a test of his English language ability. He was advised that the examinations were conducted under the same considerations and conditions applying to students from the Faculties of Dentistry in Australia.
>
> In his view, this ignored the vital factor for migrants, that English is not their native language. He said that only one overseas qualified dentist passed of the nine applicants. Candidates who do pass are granted only temporary registration. Full registration is not granted until they pass a further compulsory examination after three years. He claimed that this was discrimination.[11]

When this complaint was put to the Dental Board and to the Committee on Overseas Professional Qualifications the reply was that the ability to work with English-speaking patients was regarded as essential for professional practitioners; consequently, it was appropriate that the examination should include a test in English.

> The usual way of doing this was to conduct all examinations in English so that the written and clinical components of the examination tested the candidate's professional knowledge, practical skill, and ability to work safely and effectively in an English-speaking community. i2

In championing the cause of such complainants - of whom there are many in the medical and dental professions - the Commissioner points out that logically the issue is not about competence in academic English but rather the ability to communicate with patients and clients. In this respect, in some communities in Australia the overseas-qualified practitioner would be much more able to communicate with the patient than would the Australian-trained practitioner:

> A further serious consideration for community relations is that professional services in Australia have been, and still are, provided largely by monolingual people unable to communicate adequately, with patients and clients whose first language is not English, even though these people are in the majority in many areas of work and residence. Discrimination certainly exists in the inadequacy of such services, but this is not heing overcome by making a knowledge of academic English rather than fluency in communication a pre-requisite to recognition of overseas professional qualifications.[13]

Discrimination in favour of British subjects

Under the Public Service and Electoral Acts which were in force at the time of the British Empire the status of being a British subject enabled persons to join the Australian Public Service on arrival and to vote after six months residence, whether or not they became Australian citizens. This meant that newcomers from countries which had been part of the Empire were favoured over newcomers from other parts of the world. The Commissioner commented:

> To explain to a migrant from Holland, Germany or Greece that he must wait three years for these privileges while the migrant from Uganda or Cyprus need not, is no easy task involving, as it does, reference to echoes from the imperial past...
>
> The restriction of permanent employment in the Public Services to British Subjects does, not however constitute an unlawful act of racial discrimination within the terms of the Racial Discrimination Act 1975. Legal advice on a related point was received in the course of our inquiry into a complaint that a person of Greek origin who had resided in Australia for 40 years was prevented from voting in a local election, whereas British Subjects who were not Australian citizens but resident in Australia for six months could vote.[14]

Such cases do not lend themselves to resolution through conciliation. To the extent that the complaints are justified the matters can be remedied only by altering the regulations and procedures in question. This the Commissioner sought to do by such means as publicising the anomalies and making representations to the relevant authorities. His vigorous

efforts had their share of success. In his review, Trlin credits Grassby with having

> abolished the special citizenship privileges for United Kingdom citizens in Australia, secured rights of residence for the Australian-born children of non-Australian parents, and ended restrictions on the amount of non-English programming on Australian radio and television' 15

Other areas in which the general contribution of the Commissioner had an impact included the improvement of interpreter services in such places as courts and hospitals and the promotion of language teaching at all levels. In all these respects he made a very significant contribution by acting as a voice for the ethnic communities in expressing their feelings of frustration or distress where prevailing regulations or practices bore heavily on them, and by stimulating those in authority to take appropriate action to remedy the situation. Trlin sums up Grassby's special contribution as being 'to speak up, speak out and keep the issues of discrimination and racism before the public eye' .16

Conclusion

The use of the conciliation process did not figure prominently in the work of the Commissioner's Office in respect of complaints coming from members of the 'ethnic' communities. This was due in part to the resourcefulness of these people, who were to a large degree capable of dealing with such difficulties as they encountered them; in part to the generally benign social climate that prevailed in the country with respect to the newcomers; and in part to the fact that where grievances arose and complaints were lodged, they frequently related to matters which were not covered by the legislation. The contributions made by the Commissioner's Office lay not so much in dealing with complaints involving private citizens, but rather in changing the broader context

of institutionalised procedures which placed persons of 'ethnic' status at a disadvantage in a competitive world.

CHAPTER 4 ENDNOTES

1. *Canberra Times,* 28 June 1983, p.2.
2. Commissioner for Community Relations, *Challenges facing Australia after a generation of mass migration,* (Community Relations Paper No 1), Office of the Commissioner for Community Relations, Canberra, 1980 (1975).
3. A.D. Trlin, *Australian Racial Discrimination Act 1975: provisions, operations and obstacles to effective implementation 1975-1981,* Paper presented at Department of Demography, Australian National University, 18 November 1982.
4. ibid., p. 4
5. Commissioner for Community Relations, *Fifth annual report 1980,* AGPS, Canberra, 1980, p. 100.
6. It should be noted that in October 1983 the Human Rights Commission recommended that amendments should be made to the Racial Discrimination Act so as to make racial defamation and racial propaganda unlawful. Human Rights Commission, *Proposal for amendments to the Racial Discrimination Act to cover incitement to racial hatred and racial defamation* (Report No 7), AGPS, Canberra, 1983, p. 40.
7. Commissioner for Community Relations, *Fifth annual report 1980,* AGPS, Canberra, 1980, p. 122.
8. ibid., P. 125
9. Commissioner for Community Relations, *Fourth annual report 1979,* AGPS, Canberra, 1979, p. 47.
10. ibid., p. 143
11. Commissioner for Community Relations, *Third annual report 1978,* AGPS, Canberra, 1978, p. 43
12. ibid., p. 44
13. ibid.

14. ibid., p. 46
15. A.D. Trlin, op.cit., pp. 54-5.
16. ibid., p. 52

CHAPTER 5. FORM AND CONTEXT OF DISCRIMINATION AGAINST ABORIGINAL PEOPLE

It has already been shown that racial discrimination against members of the Aboriginal community has been more overt, more direct and more specific than that against any other group. Its more severe nature has been evident in:

(1) the relatively high proportion of complaints of racial discrimination coming from Aboriginal people;

(2) the necessity of employing the powers of the Commissioner in order to resolve matters of complaint, in contrast to the situation with the 'ethnic' communities where relatively mild approaches were usgally adequate; and

(3) the nature of the complaints, which were more likely to be in respect of offences against specific provisions of the Act and to indicate unambiguous prejudice from other sections of the population.

Racial discrimination affects virtually all aspects and areas of Aboriginal existence. The following are some of the more common forms of discrimination.

Accommodation

It has been difficult for an Aboriginal in a country town or other place with a high concentration of Aboriginal people to either buy or rent a home. Should it become known that an Aboriginal, or an Aboriginal organisation is likely to purchase a house, the residents in the vicinity of that house have sometimes banded together to raise the finance to enable a non-Aboriginal person to purchase it. The reason for such action is that it is generally accepted that should an

Aboriginal family acquire a house, the value of the neighbouring houses will fall sharply and/or they will become more difficult to sell. One real estate agent reported that it took two years to sell a house next door to one owned by an Aboriginal family, despite a relatively strong demand for houses in the town.

It is also difficult for Aboriginals to rent accommodation. A common complaint is that when an Aboriginal tries to rent a dwelling the agent or owner says that it has already been let but when a non-Aboriginal person subsequently seeks to rent the same dwelling he or she is informed that it is available. Typically also when an inquiry about rental accommodation is made by telephone the response is positive but when the Aboriginal walks into the agent's office to negotiate the lease it suddenly ***eme;ges*** that there has been some mistake and the accommodation is not available.

The reason given by estate agents for their unwillingness to let accommodation to Aboriginal tenants is that the latter will not take care of the property, that they will overcrowd it and subject it to harsh treatment. And when Aboriginal people are accepted as tenants they are often required to pay a more substantial bond than would be required of a non-Aboriginal tenant.

Employment

Getting a job can be difficult, but if you are young, have a limited education, live in a country town and have Aboriginal features it approaches the impossible. There are not many complaints by Aboriginals about discrimination in employment, but this seems to be due more to the fact that they are rarely in a position where they have a reasonable expectation of being employed than to lack of reason for complaint.

I had the opportunity of being present at an inquiry into a complaint lodged by an Aboriginal woman against the manager of a large retail store in a country town. The woman had heard that there would be vacancy for a young girl in the store. She approached the manager to explore the possibility of her niece obtaining the position. The manager asked her some questions about the girl's level of education and other matters, including 'How Aboriginal looking is she?'. Since this question seemed irrelevant from any point of view other than as involving discrimination on racial grounds and since her niece was not considered for the position, the Aboriginal woman complained to the Commissioner for Community Relations.

In the inquiry pursued by a member of the staff of the Human Rights Commission, the manager maintained that his question was simply part of an attempt to get a general picture of the girl, on a par with such questions as 'How tall is she?' or 'Does she have a friendly manner?'. He went on to say that he was not racially prejudiced and that, in fact, he employed a young male Aboriginal. When asked where in the store this youth worked, he said he was employed in the packaging room. To the further question, put to him by an Aboriginal representative present at the inquiry, as to how Aboriginal looking this employee was, the manager replied 'Not bad'. It emerged that the employee in question, though of dark complexion, was more European than Aboriginal in appearance.

Aboriginals are not employed in retail establishments in country towns - particularly in retail areas where food lines are handled - in deference to the racial prejudice of customers. When they are employed in such establishments it is usually in an area where they have low visibility, as in the packaging and stores handling sections.

Refusal of service

Aboriginal people are often subjected to the indignity of refusal of service. The most frequent offenders are hotel

proprietors and their staff, but other venues where the offence occurs are restaurants, discos and other places of entertainment. The refusal may be qualified or partial; for example, an Aboriginal may be served in a designated bar-room but not in a lounge. It is not many years since Aboriginals attending films in some towns were required to sit in a roped-off area in the front stalls.

The argument offered by those guilty of such offences under the Racial Discrimination Act is that they are excluding from their premises people whose behaviour would be offensive to the main body of their patrons. Since their livelihood is dependent upon maintaining the standards of conduct desired by the majority of patrons, they exclude those whose behaviour would contravene these standards.

Hotel keepers, in common with other providers of goods and services, have the power to refuse service to those individuals whose behaviour is grossly offensive. Such rights are exercised. Thus non-Aboriginals and Aboriginals who have damaged hotel property or whose behaviour towards other patrons has been offensive either physically or verbally can be, and in practice are, banned from further service in that establishment. But the practice sometimes adopted of refusing service to all Aboriginals after incidents in-which members of that race were involved in incidents of a violent nature is quite another matter. When this happens, respectable law-abiding citizen's become subject to humiliating and disparaging treatment.

Police

Although relations have undoubtedly been improving between police and Aboriginals, the predominant attitude of the latter toward the former seemed to be one of alienation and fear. There seemed to be very few Aboriginals serving as police in the federal and State police forces. There would seem to be very little identification by Aboriginal people with police.

On the contrary, the tendency has been to see the police as ah oppressive force more concerned with maintaining the privileges of the dominant non-Aboriginal society than with the plight of the minority group.

The complaints by Aboriginals about police behaviour include harassment, wrongful arrest and offensive treatment ranging from verbal abuse to physical violence. Police have been accused of making forcible entries to homes without search warrants and by such methods as kicking in doors. While there has been, according to Aboriginal informants, a sharp decline in such practices in recent years, the feeling remained strong in the Aboriginal community that the sympathies of the police were aligned with the power structure rather than with them. It is a common complaint that, when trouble of a violent nature involving members of both races occurred, it was the Aboriginals who were arrested and charged while the non-Aboriginals went free. In other cases where white youths have harassed and terrorised Aboriginal residents, it was alleged that the police were slow to act or tended to treat the incidents as juvenile pranks.

The 1980-81 report of the Commissioner, for Community Relations listed a total of thirty-eight complaints of racial discrimination by police during the year. The racial or ethnic group of the complainant is not listed in five cases; in nine cases the complainant was from an ethnic group other than Aboriginal *(e.g.* Turkish, Yugoslav); in twenty-four cases the complainant was an Aboriginal.

Barriers and gatekeepers

It is not contended that estate agents, managers of retail stores, hotel proprietors, or policemen are any more racist in outlook than other members of the community. In all probability they are, in this respect, a representative cross-section of society. The fact that they figure more frequently in complaints of racial discrimination is to be

attributed not so much to their personal qualities as to the strategic positions they occupy at the interface between the two cultural groups. Trlin's useful metaphor has them as 'gatekeepers'-, controlling the interpenetration and interaction of the different cultures or lifestyles.

In Australian society some members of the dominant non-Aboriginal culture occupy a privileged position with respect to access to goods and services. By this is meant not only the possession of material goods but also the less tangible aspects such as the right to enjoy them in congenial environments free from interference or disruption by others. The maintenance of such exclusive rights required the imposition of barriers which keep out those less privileged individuals or groups whose presence is not desired.

But such barriers usually have their permeable points by which the excluded may intrude into the areas of privilege. Thus a member of the deprived group may acquire a residence in a choice residential area, thereby breaching the barrier between the groups and penetrating into the territory of the privileged. Similar breaches of the barrier, with consequent intrusion of the excluded into the domain or 'life space' of the advantaged, may occur in the realms of public entertainment or relaxation - discos, theatres, restaurants and hotels - where the participants come into relatively close contact or share common experience.

The people who control entry at such permeable points, or gateways, are under pressure from the privileged class to keep the gates closed or at least to exercise tight selectivity in respect of those who are allowed to pass through. Estate agents with a reputation for selling or letting accommodation to Aboriginal people are likely to lose their more affluent clients. Similarly, hotel proprietors who throw their premises open risk losing their non-Aboriginal clientele, and shoppers are believed to be less likely to patronise businesses where they will be served by 'Aboriginal-looking'

staff, especially where the commodities on sale include food lines.

The police for their part have the task of ensuring, that the existing systems of controls work, that the established rules are observed and that entry is not gained by force or other illicit means. It would thus be unrealistic to regard the persons complained against as the source of racial discrimination. Behind them is an anonymous mass of ordinary respectable citizens who exert their subtle but effective pressure in maintaining their favoured position. If change is to take place it will be necessary to reach this large body of the population and bring about a change in the attitudes prevailing within it. Therefore, the settlement of the matters giving rise to the complaints must aim beyond punitive measures against the respondents to the production of changes in the interactions between the two communities. Only changes in the direction of a better understanding and a higher level of mutual respect and acceptance can offer the prospect of a long-term resolution of the issues.

This obviously requires persistence, patience and a capacity for working with other forces in the community. There are many such forces at work both in the country at large and within the Aboriginal community which contribute to such developments. In a sense the legislation itself and the creation of the Office were an outcome of the operation of such forces.

CHAPTER 6. DEVELOPMENT OF A STRATEGY OF CONCILIATION

The Racial Discrimination Act provided few guidelines as to how the conciliation process was to be conducted.

Considerable freedom was given to the Commissioner and his staff as to how they would proceed in such work and consequently the approach taken became, to a substantial extent, a function of the perspectives and resources of those appointed to implement the Act.

The first Commissioner (A.J. Grassby) had a keen interest in the promotion of communication and community development, but his responsibilities in terms of policy making, administration and maintenance of contact with representatives of various community groups and organisations precluded him from becoming actively involved in the more practical aspects of conciliation. The task of developing this side of the activities fell to Mr George Wyer, a career public servant initially seconded to the Office for the purpose of setting it up and administering it, who was appointed first as Assistant Commissioner and later Chief Conciliator.

Wyer's appointment was fortuitous. He had not sought the position and accepted it initially on the understanding that ' his appointment would be for a limited period. But he brought to the task a combination of experience and resources that were influential in shaping the direction taken in the conciliation of complaints. He had had over twenty years experience in a number of government departments, including four years in the Organisation and Methods section of the Public Service Board, which had the effect, to use his words,

> of removing the mystique of procedure, policy and legislation in that it opened up the questioning of each in relation to the task in hand.

He had an interest in law which he had pursued as far as completing a substantial section of the course leading to admission to the Bar in New South Wales. Though not constituting a legal training as such, it enabled him to make good use of the legal support available to the Office. He had a concern for the welfare of persons, particularly those suffering hardship, and had been largely responsible for the opening of the first house for destitute men in Canberra - a need of which he first became aware through his experience as Officer-in-Charge of the Canberra office of the Department of Labour and National Service. His work with destitute men gave him an understanding of and an ease in relating to the less privileged members of society. He had also been trained as a marriage counsellor. The skills acquired in promoting communication in the highly emotional context of domestic conflict was to prove valuable later in the intense confrontations that characterised the resolution of complaints of racial discrimination. To these potentially valuable resources which he brought to the task of conciliating complaints of racial discrimination and the promotion of community relations might be added the attribute of being able to relate easily and naturally but, where necessary, forcefully to a broad spectrum of society ranging from the weak and underprivileged to the wealthy entrepreneur or powerful official.

Getting started

The Commissioner was appointed in July 1975 and the Act was proclaimed on 31 October 1975. The early months were devoted to establishing an organisation and recruiting staff - a task complicated by the political events of November 1975 - and to dealing with such complaints as reached the Canberra office. It was not until February 1976 that Mr Wyer, as Assistant Commissioner, went with two other officers by car through north-eastern New South Wales to make contact with the Aboriginal and non-Aboriginal communities. The aim was to assess the situation and to explore the ways in which the

Office might contribute to better relationships between the communities by educational and/or conciliatory procedures.

It was a depressing experience. The gulf between the two communities was wide and the ***few*** points of contact marked by conflict. Discrimination on racial grounds in respect of accommodation, employment, service in hotels and elsewhere and harassment by the police was commonplace. The Aboriginal people were angry but helpless. They had no means of obtaining redress of their grievances other than in unproductive outbursts of violence. They were caught in self-maintaining cause-effect circles of unemployment, atrocious living conditions, lack of incentive to achieve, boredom, alcoholism and depression. From the point of view of the non-Aboriginal community the behaviour of the Aboriginal people was seen as being a consequence of their innate disposition rather than of the circumstances under which they lived. They were seen as being lazy, undisciplined, unhygienic, improvident, alcoholic and given to violence. To the Aboriginal people, the non-Aboriginal community was seen as the oppressor that had taken everything from them and forced them into a subservient existence. The beliefs each group held about the other tended to be self-confirming in that they gave rise to behaviour that elicited responses which confirmed the beliefs.

Given the great gulf between the perspectives prevailing in the two communities, it was difficult to see how the situation could be transformed into one of intergroup harmony and mutual respect. However laudable the aims of the Racial Discrimination Act, its implementation seemed to pose a virtually impossible challenge. The task was not made easier, it seemed, by the very mild nature of the sanctions which could be imposed on offenders. Indeed the initial reaction to the Act by members of the Aboriginal community, when they became aware of its provisions, was largely one of disappointment.

It was while contemplating this gloomy outlook that Wyer had a conversation with the Sister in charge of a small group of nuns working with an Aboriginal community on the outskirts of a country town. After commenting on the depressed state of the Aboriginal people, he went on to say; 'You must find your work here terribly frustrating'. 'Indeed I don't, Mr Wyer. I find it very satisfying and worthwhile,' she replied, much to his surprise. Somewhat taken aback, he asked her what she did that made it worthwhile and received the reply 'We do what we can'.

Sometimes a very simple statement can strike home and have a quite profound effect. Wyer had been looking at what the Act was designed to achieve and contrasting this with the prevailing state of affairs. Seen in this context, the task seemed an impossible one and it was difficult to know even where to begin. But the nun's statement changed the perspective. It put emphasis on the beginning, that is, on working with the situation as it existed and doing the best one could with such resources as were available in both the Aboriginal and non-Aboriginal communities. It meant trying to come to grips at a concrete level with the individual members of both communities in their interactions with each other.

The avenue leading to this was the complaint. Complaints dealt with concrete specific instances of racial discrimination. Generalised allegations that hotel proprietors were refusing service or that police were harassing young Aboriginals could be ignored, denied or evaded. But a specific complaint that on a given occasion an identified barman had refused to serve an identified Aboriginal must be taken seriously, investigated and resolved. Complaints gave access to the transactions between complainants and respondents, and their resolution required personal confrontation, often of an intense nature involving the conciliator and the contending parties.

While the first objective was to obtain a just settlement for the individual, the broader aim was not merely to resolve the specific matter of the complaint, but to go beyond this to develop the abilities of the parties to the complaint, and other interested members of the local population, to resolve such conflicts themselves. This meant cultivating the resources of the community for handling interracial issues. Ideally the person having a grievance would be able to take it up with the alleged offender and settle the matter. Since this is not often possible, the next most desirable procedure would be to invoke the good offices of some mutually acceptable local individual or organisation to mediate in the matter and help the parties to negotiation a workable compromise. Only as a last resort should it be necessary to call on an outside agency - in this case the Commissioner's Office - for action in the matter.

The implementation of such a policy required the setting up of local committees consisting of persons of goodwill and concern for inter-community relations drawn from the different racial groups. Such Consultative Committees on Community Relations, for which no provision was made in the Act,' did indeed come into being through local initiative and encouragement from the Commissioner in a number of rural and metropolitan centres and were to prove effective in resolving grievances and defusing potentially explosive situations. Their nature and operations are discussed in Chapter 10.

The establishment and evolution of such committees depended very much on the successful implementation of the Act. It was important to show that the Act could, and would, be enforced and furthermore that this could be achieved by conciliatory, but firm, methods. That is to say it was necessary to demonstrate both that the Act had some force and also that, with the development of some skills in interpersonal communication, the outcomes of its application could be conducive to better understanding and respect between the parties.

Towards such ends a practice was adopted of including in any inquiry or compulsory conference dealing with a complaint by an Aboriginal of racial discrimination at least one representative of the Aboriginal people other than the complainant. This served the two purposes of providing moral support for the complainant, who might feel intimidated if all other persons present were non-Aboriginal, and also of providing practical experience for the Aboriginal representative(s) in the conduct and procedure of the inquiry and settlement process. It is interesting to note that the presence of such representatives, who could show considerable understanding of the respondent's position, and who usually expressed themselves in dignified and straightforward terms, often made a valuable contribution to the development of dialogue between the contending parties. As they were not personally involved in the matter at issue, but were well aware of the experiences to which their people were subjected, they were often able to present the case forcefully but more objectively and in less provocative terms than the complainant might use.

The initial attempts to apply the provisions of the Act met with considerable resistance from respondents. The example given in Chapter 2 of the hotel proprietor and police inspector is indicative of the attitude adopted. Sometimes respondents sought to be legally represented at compulsory conferences, but as there was no provision for this in the legislation and as it seemed that such representation could impede the conciliation process, it was usually not permitted. On occasions, however, when the respondent proved unusually recalcitrant, the presence of a legal adviser might be requested to induce a sense of reason and realism.

It was a feature of the 'doing what one could' philosophy that a low-key approach was adopted, with an avoidance of provocative stances and remarks. While confrontation was usually inevitable it was kept as muted as possible consistent with ensuring that justice was done. The aim, in accordance

With the spirit of the legislation, was to assist the different groups in the community to work through their differences and find a basis for co-operation. It was recognised that there were many forces already at work to build a more just and equitable society and that it was not the role of the Office to displace or override such efforts, but rather that the task was to work with such forces and facilitate their operation.

Nevertheless the fact remained that the introduction of the Racial Discrimination Act constituted a major step in the development of relations between the Aboriginal and non-Aboriginal communities. Although the powers conferred by the Act - to call compulsory conferences and to issue certificates to clear the way for court action when conciliation failed - might not seem impressive, they nevertheless constituted a serious threat to anyone seeking to maintain a privileged position by discriminatory practices. The intense hostility and anger often displayed by persons directed to attend compulsory conferences for alleged breaches of the Act is indicative of the potency of that threat.

The emphasis on working with local groups in an attempt to help them to develop their own resources for settling differences and resolving intercommunity conflict, rather than taking a narrow view by treating each complaint as a separate and isolated matter, had some logistical implications. With virtually the whole of the continent to be serviced by a small staff in the Canberra office, the question of how to travel to the site of each complaint required consideration. When attempts to resolve the matter of a complaint by the use of mail, telephone or the good offices of a consultative committee or local citizen failed, then it became necessary to send out an officer to look into the matter and try to settle it, if necessary, by a compulsory conference.

From a narrow complaint-oriented perspective, the simplest procedure in such a case would be to tend an officer to the site by the quickest route often by air to get the parties, together, settle the matter and return to Canberra. The disadvantage of such a practice, would have been that it did little to establish close working relations between the Office and local community workers. , It would have meant that only those centres which had unresolved complaints would be visited and those visits would be controlled by airline schedules with little flexibility or freedom of movement to make or maintain local contacts. The officers involved could be expected to retain something of the Canberra perspective rather than develop a feel for the local situation.

The practice adopted initially was to make periodioc tours by car, taking in a series of country centres. Such tours were planned in advance in accordance with the accumulation of outstanding matters requiring attention. They allowed for brief calls at centres en route which might have no current matters requiring attention but where contact could be maintained or re-established with members of consultative committees, police officers and others involved in maintaining good community relations. Such visits not only maintained ties with the remote communities but also enabled the Office to keep in touch with developments in country areas. Since car travel is relatively flexible, it was Possible to vary schedules as circumstances demanded, to make unplanned detours should these become desirable and, if necessary, to double back in order to finalise a matter in which action may have been initiated earlier on the tour. In other words, travelling by car gave the advantage of flexibility and a means of keeping in touch with a network of people and events over an extended area. The procedure had the quality of patrolling an area to keep abreast of changes taking place within it, maintaining liaison with the relevant people in the area and, by exposure - over periods running into weeks - to life in country towns, gaining a perspective on human

existence and interaction not available from a Canberra office.

The approach developed for resolving complaints, reducing conflict and developing more co-operative community relations was thus low key in nature and designed to encourage local initiative. It recognised the existence of positive forces for change in the community and was designed to work with and provide support for such forces rather than to supplant them. It operated on the principle that the legislation, however mild in its sanctions, did provide a means for confronting racial discrimination and forcing a recognition of the rights of the oppressed. Above all, the approach was based on the principle that the path to change lay through conciliation and education as enshrined in the Act.

CHAPTER 7. SETTLING THE MATTER OP THE COMPLAINT

A complaint of racial discrimination is a symptom of discord in community relations. It indicates the existence of interpersonal or intercommunal conflict which it is beyond the resources of the participants to resolve unaided. In making the complaint, one of the parties to the relationship invited the intervention of a third party - here, the Human Rights Commission and the Commissioner for Community Relations - to resOlve the matter.

Without such an invitation, intervention would be intrusive and possibly unwelcome. Once the invitation has been extended, however, intervention is legitimate and its form a matter for the Commission and the Commissioner.

In developing a strategy of intervention two major considerations were kept in mind. The first was the immediate objective of ensuring that the complainant's grievance was fully heard and that, as far as possible, any injury suffered in either a material or mental form was redressed. The second was the longer term objective of working for a more equitable society with the elimination of discrimination and the amelioration of intergroup conflict.

In terms of the interests of the complainant, this meant not only achieving a settlement with which the person was satisfied, but also affirming the person's rights as a full member of a democratic society. This was to be achieved by giving the complainant an opportunity to confront, in a supportive context, the person who would deny those rights. By providing a situation in which power and status were treated as irrelevant and the complainant could address the respondent on a direct personal basis, the conciliation

conference offered the complainant an opportunity to assert his or her dignity and integrity. For an Aboriginal dealing with prominent business people or local officials this was likely to be a new experience.

With respect to the respondent who may have been guilty of an act of racial discrimination, the task was to establish its unlawful' nature and the right of the complainant to reparation and to ensure that the respondent would avoid similar acts of discrimination in the future. It was seen as essential that the treatment of respondents should be firm and be pursued with whatever persistence and determination was necessary, but it was also seen as important that they should be treated with consideration and understanding. The objective was to gain the assent of the respondents to both the spirit and the letter of the legislation, not to promote antagonism and hostility to its provisions.

The longer term aim was progressive change within the community toward the elimination of acts of racial discrimination and the resolution of intergroup tensions or disputes. The firm enforcement of the provisions of the Racal Discrimination Act was seen as an essential step in this direction both by acting as a deterrent to discrimination and in giving confidence to those working for a better deal for the oppressed. At the same time a need was seen to use local resources. If people of goodwill in each local community could be encouraged or supported in working for more harmonious community relations, the work of the Office could be substantially enlarged.

Citizens were encouraged to form local Consultative Committees on Community Relations in many localities. The Consultative Committees were not given the power to convene compulsory conferences. But, at an early stage, the practice was adopted of including one or more members of the local Consultative Committee in compulsory conferences. These were often highly

charged emotionally and stressful on the main participants and provided useful practical experience in dealing with emotional aspects of conciliation work. Furthermore the presence of such persons, the majority of whom were Aboriginals, also provided support for Aboriginal complainants.

We can now consider an example of the settlement of the matter of a complaint by means of a compulsory conference at which I was able to attend as an observer.

The complaint

An Aboriginal man complained in writing to the Commissioner that he was refused service in a hotel in T--, a large rural centre. The man had entered the hotel about midday with the intention of having a couple of glasses of beer and a counter lunch. He ordered a beer and packets of cigarettes and matches and was served by the barmaid. When he had finished his beer and was about to order another and a counter lunch, the barmaid told him that she had orders from the manager to serve only those Aboriginals she knew to be customers served at the hotel. Since he was a stranger to her, she had already broken the rule in serving him at all and she could not continue to do so. The Aboriginal listened to her and when she finished left the hotel. He then lodged his complaint.

Contact was made by the Office with the manager who replied by mail to the effect that the barmaid had verified the facts as stated by the complainant. He also said that he had given the barmaid the instructions as stated. He said these instructions were necessary for the good management of the hotel.

Since it was apparent that the manager believed he had a right to issue instructions to his staff which would result in discrimination against Aboriginal people and that the matter was unlikely to be resolved by correspondence and telephone, a

compulsory conference was arranged for a day on which George Wyer and another officer, Philip Moss, would be in the area.

The conference was held on a Monday morning commencing at 10 a.m. in a room in the local court chambers. The formal conference was preceded by preliminary meetings with both the respondents and the complainant as part of a process the Chief Conciliator called 'footwork'. The term has two meanings - one literal and one metaphoric. The literal reference is to footwork as the physical moving among the complainant, respondent, community representatives and others having a reasonable interest in the case. This moving around, which' allows various persons or groups with an interest in the case to ventilate their feelings and clarify their positions, is seen as an essential prerequisite to successful conferences. Much of it is done on foot.

The metaphorical reference is to the 'footings' which constitute the structural base of buildings. This preliminary activity before the participants are brought face to face on confrontation is seen as the laying of foundations for constructive interaction and resolution of the matters in dispute.

Preliminary meeting with respondents

With the conference scheduled for the Monday morning, the conciliators, whom I was accompanying, arrived in town during the weekend and early on the Sunday afternoon called, by appointment, at the hotel to meet the respondents. When we arrived the manager was serving in the bar. His wife, in whose name the licence was held, and who was therefore also a party to the complaint, was resting upstairs. The barmaid was absent and could not be contacted. It seemed at this stage as if the respondents were not taking the conference very seriously.

Ostensibly the purpose of this preliminary meeting was to acquaint the respondents with the form the conference took, the requirements in regard to attendance and related matters and to deal with any questions the respondents might have. The more basic reason, however, was to give them an opportunity to ventilate some of their feelings about being summoned to the conference.

A common reaction to being directed to attend a compulsory conference with an Aboriginal who alleges racial discrimination is one of anger and outrage. It seems to be the reaction of a person whose position of power is suddenly - challenged by someone who is expected to be submissive and subservient.

Such a state of mind on the part Of the respondent is not conducive to a constructive outcome for the conference. Indeed, if a respondent enters a conference in that state, the most likely consequence is that he or she will provoke the complainant into an extreme stance and make conciliation difficult, if not impossible. Therefore the preliminary meeting is held to give the respondent an opportunity to express his or her feelings in a context where such expression can do little damage, and then to come to a more rational evaluation of the situation. Such a realistic re-evaluation is necessary for many respondents who are either unwilling or unable to accept that their acts of discrimination are indeed illegal.

In this particular case, arrangements were made to meet initially with the licensee while her husband, the manager, served in the bar. She would then relieve him in the bar while he talked with Wyer and Moss. My presence as an observer was explained and accepted.

The licensee initially took a stiff and hostile stance. She wondered at the waste of money involved in sending two senior

officers all the way from Canberra to harass people trying to run a decent hotel. She fairly quickly thawed, however, on getting a receptive hearing and became attentive when the situation in which she was placed was explained to her. She seemed to recognise that the officers were not being vindictive, but rather were trying to effect a constructive resolution of the matter.

She was more responsive than her husband, who viewed his visitors with hostility and suspicion. At one stage he came into the unused bar room where the meeting was taking place and-said loudly and aggressively: 'Is this an inquisition - is this going to be used tomorrow in court?' 'No it isn't', his wife replied in an equally forceful tone, 'just keep out'.

He attempted to intervene again, and again she told him to keep out. It was clear that by this stage she had reached a relatively realistic appreciation of the situation and was more ready to co-operate in resolving the matter. She raised the question of the difficulty they would experience if all three of them - manager, licensee and barmaid - had to be present at the conference as the hotel would have to be open and there was no one else to serve in the bar. This question was discussed and the possibility of hiring temporary assistance was raised. It was also indicated that as the main issue centred around the policy of restricting service to Aboriginal people by refusing those unknown to the staff, the barmaid's part was a relatively small one and she could be excused at an early stage.

By the time she left to take her husband's place in the bar so that he could talk with the conciliators, the licensee's initial resentment towards the officers had substantially abated. Her anger was now directed at the Act which she saw as discriminating against people in her position and pandering to loafers and troublemakers among the Aboriginals.

The manager, when he entered the discussion, was initially quite unprepared to listen. He adopted the stance that was a mixture of aggression and appeal and spoke as if he were haranguing a large audience. As he put it, he was trying to run a decent family style hotel in the face of great difficulties caused by the dirty and disorderly behaviour of number of Aboriginals, and all the Government could do was to hound him and try to destroy his business. He kept taking the line that the conciliators were there to crucify him. He repeated at length the troubles that Aboriginals caused him and interspersed these with such statements as 'Please gentlemen, you tell me how else I can run this business'. His argument broadly was that he could ban the troublemakers who spoiled and damaged the hotel and its fittings, but when he was not present these banned people, who hung around outside the hotel waiting for him to leave, would come in, get under. the influence of alcohol and cause more trouble and damage.• He asked whether he was supposed to stay in the hotel all the time. Wasn't he entitled to some relaxation and recreation?- The only way he could have the hotel running in an orderly manner was to give instructions that when he was absent from the hotel only those Aboriginals who were known to the staff: as customers of the hotel - that is persons known to be orderly and of good character - were to be served. If the conciliators could think of some other solution he would be glad to adopt it.

This rhetoric continued for approximately an hour and then changed suddenly in response to an innocuous remark. He had said earlier that the only break he had had from the hotel was a three week holiday abroad. During that time a temporary manager had looked after the hotel. In a reference to this he was asked how the manager had got along with the Aboriginels • He replied in a more natural and friendly conversational tone, 'Quite well', and thereafter continued on that conversational level. It was a noticeable change, though the reason was obscure. Perhaps he anticipated the possible follow-up question: 'Didn't all those people who had been banned, but

whom he didn't know, flood in and wreck the place as soon as you left?' In any case his change of tone made the question inappropriate. The discussion became realistic. It was arranged that the barmaid, after attending for the opening of the conference, would be excused at an early stage in the proceedings to attend to the bar.

The manager wanted to stand a round of drinks. This was politely but firmly refused. The Chief Conciliator paid for a round. The discussion turned to football. We finished our drinks and left.

Preliminary meeting with complainant

The complainant was receiving treatment at a hospital in another town and did not arrive at the conference location until early on the Monday morning. He was met by the second conciliator and taken to the Aboriginal Development Commission office where a preliminary meeting with the two officers took place. He was a relatively tall man of slender build, quietly spoken and rather slow in speech. He was middle aged and had considerable social poise. He seemed quite comfortable and relaxed.

The proceedings of compulsory conferences were explained to him and he was told who would be present. He seemed somewhat surprised and not altogether pleased when told that an Aboriginal woman, active in the community relations work area and a member of the local Consultative Committee on Community Relations, would be present. He wanted to know what she had to do with the matter, but accepted without comment that she would be there to help in achieving a settlement. He was told she had attended other compulsory conferences and was a helpful influence.

He was asked if there was anything he would like to know or wanted to say. His response was that all he could say was

what had happened to him and the only person he could speak for was himself. He said he knew nothing about these conferences or what sort of redress he could obtain. He said that he did not think that an apology and a promise not to repeat the offence would be enough, Put that the publican should be hit in the pocket where it could hurt just as he would be if he (the complainant) broke the law. When the Chief Conciliator asked him if he had any particular amount in mind, he said he did not know what was appropriate in these cases. He thought the conciliators would know about such things. It was explained to him that the terms of settlement were matters for the parties involved and that arrangements arrived at varied greatly. Factual information regarding settlements in other cases was available. Where monetary settlements were arrived at these had ranged in amount from $35 to $333 (the latter a third share of $1000 paid to three complainants).

The conference

We proceeded to the court rooms taking the complainant with us. The Consultative Committee member, a friendly young Aboriginal woman, whom we will call Ms Hall, was waiting. The respondents were late in arriving and eventually the manager appeared saying that the barmaid had not turned up for work and his wife was serving in the bar. The Chief Conciliator took him to task, pointing out that it was a compulsory conference and that any person not attending rendered himself or herself liable to a substantial penalty. The manager said that he did not know where the barmaid was. The Chief Conciliator insisted that all who had been directed to attend would leave themselves open to prosecution for an offence under the Racial Discrimination Act for not abiding by a direction to attend a compulsory conference. In the meantime they would proceed with the conference in the absence of the licensee and barmaid.

The conference was formally declared open. The complainant was asked to say what had happened. He proceeded to give the account as described above and 'finished by saying that the refusal of service left him feeling hurt and humiliated.

The manager asked him to repeat exactly what the barmaid had said to him. The complainant did so in precisely the same terms he had used before. The manager did not challenge the statement, but then proceeded to put his side of the case which was broadly a repetition of the stand he had taken the previous afternoon. He talked about the disgusting and destructive behaviour of many of the Aboriginals that had been in his hotel. He had barred many of them for what they had done, but these barred individuals came back in as soon as he left the hotel. He said he had an all female staff to run the hotel And they would not be able to handle unruly behaviour that occurred when some Aboriginal people got drunk He said he did not bar all Aboriginal people. There were many who drank In his bar and were very fine people. His staff had instructions to serve those they knew and simply refuse to serve any Aboriginal they did not know. This was the only way he could ensure that they would be able to maintain order in his absence He was required by the licensing laws to run an orderly hotel and this was the only way he could do it.

It was pointed out to him in different words by others present that his instructions constituted racial discrimination. He had Many Unruly white customers whom he barred - a point he had Made himself - but he did not give instructions to his staff to refuse tO serve any white person they did not know as a customer of the hotel.

With the discussion becoming stalemated, the Chief Conciliator suggested they should try' to get the barmaid in. She had by this time arrived at the hotel (which was a short distance from the court rooms). She arrived and gave her account which was in agreement with that of the complainant. She then went

on to take a line that was generally supportive of the manager. She said that when she first began working in the hotel she had not agreed with the manager's strong line on Aboriginals, but as a result of her experience with some of these people she had come around to agreeing with him.

The discussion was comparatively free flowing. Each person received a good hearing with very little interruption except for an intervention at one stage by the Chief Conciliator. In this instance, the barmaid, apparently in an attempt to support the manager, began to say that she thought she recognised the complainant as a man who had caused trouble in the hotel in the past and that now, as she thought back on it, he had seemed drunk at the time she had refused him service. This was inconsistent with previous accounts of the incident. The Chief Conciliator interrupted to tell her that unless she was very sure of her facts she was pursuing a dangerous line and he would strongly advise her not to continue with it As he put it, she 'should get off that tram'. She took his advice. (It might be mentioned here that the complainant had said he had been dropped off at the hotel by a friend with whom he had spent the morning and that he had rejoined this friend immediately after his refusal of service at the hotel. He would have had little difficulty in establishing his sobriety on the occasion.)

The manager became more aggressive and emphatic that he was not going to change his way of running the hotel. He said the law was foolish and that it was destroying him. He was not going to let that happen to him. He would fight and he would win - this latter statement was made in very loud and forceful tones.

The barmaid had been excused to go back to the hotel to relieve the licensee. The Chief Conciliator, who had apparently considered that the discussion was moving toward a hardening of positions, suggested a break while he had a talk

with the manager. The pair of them left the room and walked down the road toward the hotel. On the way they met the licensee on her way to the conference. They all returned together.

The licensee did not have much to say. She talked about the difficulties they had in running the hotel because of the behaviour of the Aboriginals. At this point Ms Hall spoke very gently to the licensee telling her that she could appreciate the difficulties that she had. She said she agreed that there were some Aboriginal people that behaved very badly and that she did not like that any more than the licensee. But she went on to say that not all Aboriginals were troublemakers and it was very unfair to discriminate against her people as a whole because of the behaviour of a section of them. It is perhaps worth noting that, throughout the conference, Ms Hall was treated by the respondents and related to them courteously and quietly.

The conference had gone into the lunch period without approaching a resolution. Before it was adjourned for lunch, the Chief Conciliator advised the manager to consult with his solicitor about his legal position. Up to this point the complainant had continued with the stance he had taken in the preliminary meeting. He stated what had happened. ***He*** said people who had broken the law should be punished for it just as he would have been punished if he broke the law. He would not say what amount he sought, but made vague references to the fact that the New South Wales Act covering similar situations set a limit of $20,000 to what could be claimed.

When the conference resumed after lunch both the licensee and her husband, the manager, were present, but not the barmaid. The manager said that he was prepared to offer an apology but that was as far as he would go. He said his wife had cried all through the lunch break. He said that he wouldnot pay the complainant anything. He said that the complainant had

set him up and, in answer to a question from the Chief Conciliator, he said he had witnesses who would testify to that. In response the complainant, in the same call unemotional tone that had characterised his speech throughout; said that he certainly had not set up the incident and that he did not know what the manager was talking about in saying that he had witnesses.

The discussion from this stage focused around the terms of settlement. The manager seemed to have given up his claim that he was justified in the orders he had given, and that he ' would continue to give them. His line now became that he was being 'got at' by the complainant who had not been a *bona fide* customer, but someone out to get some money out of him. • The complainant remained unruffled and denied the charge.

At one stage the manager became very emotional. He shouted that he was being ruined by the complainant who was exploiting the power the law gave to destroy the livelihood of a man trying to do the decent thing and to run an orderly family hotel. The law was stupid. The outburst had a hysterical melodramatic quality. The Chief Conciliator who was outwardly unmoved quietly told the manager that there was no need to raise his voice - all present were giving him an attentive hearing.

Ms Hall said she had considerable sympathy for the manager and could appreciate how difficult it was to maintain order. There was a time she said when she had given hotel proprietors some trouble, but Aboriginals, like white people, were individuals and they wanted to be treated for what they were and not in terms of some class to which they were assigned. There were troublesome whites, but no one suggested that all white people should be treated alike. The manager responded positively to this saying that several of those Aboriginals who drank in his hotel were among the finest people he knew.. However, he said there were relatively more troublesome people among the Aboriginals than among the whites.

The Chief Conciliator moved the discussion in the direction of terms of settlement. The complainant became more definite that he wanted a money settlement which would have a punitive effect on the publican - apologies were cheap and promises meant nothing. Ms Hall expressed the view that she would prefer a public apology printed in the local press that would be a warning to other hotel keepers in the area. This was not acceptable to the complainant. The manager said he would not pay the complainant a penny.

The Chief Conciliator asked the two Aboriginals if they would mind leaving the room while he talked with the respondents. When they left he asked the manager and his wife to state the ultimate terms on which they would be prepared to settle. The manager said he would apologise and that was it - he would not pay the complainant a cent because the latter had set him up and was just trying to get some money out of him. He said he had witnesses whom he would bring to court, if it went that far, to testify that the complainant was not a bona fide customer. He further said that before he would pay anything he would take action to make himself bankrupt and the complainant would get nothing.

The Chief Conciliator then asked for the two Aboriginals to return. He then restated the situation as he saw it that the complainant wanted the manager to be hit in the pocket so that it would be a lesson to him, and the manager was not prepared to pay the complainant anything because he believed the latter had set him up. He went on to ask what they would both think of a settlement which involved a public apology by the manager and an undertaking not to repeat the offence, together with the payment of a sum of $200 - the average amount in money settlements made in past cases - to be made to a charity nominated by the Commissioner and to be used to assist Aboriginal people. The manager's response was that this constituted a possible basis for consideration, but he wanted time to check out some witnesses and to get further

legal advice. The complainant said he wanted time to think it over and also get further legal advice.

The possibility of adjourning the conference until the following day was raised, but the complainant said he was unable to remain in town. The Chief Conciliator then proposed adjourning the conference on the basis that, if the terms he had suggested were acceptable to both parties, they could advise him and that would settle the matter, but if not, the conference would be reconvened in one month's time.

The conference had :taken almost the whole day. As we drove away from the town the Chief Conciliator wondered whether he could have finalised the matter if he had kept the conference going a little longer. I said I personally thought not, but that I did not see how the parties could fail to settle on the terms proposed. It was therefore without surprise that I learned a few weeks later that they had done so and that it would not be necessary to reconvene the conference. A local charitable organisation was grateful for an unexpected donation, and the matter closed quietly.

There remained the question of whether the manager had been, as he put it, 'set up' by the complainant. If he had been, he could hardly complain since he would not have been vulnerable to it had he not engaged in racially discriminatory practices.

The conference did not at any stage seem in danger of getting out of hand, despite the anger, bluster and at times dramatic behaviour of the manager. There was a notable change in his position over the lunch break which opened the way for discussion of settlement terms. Such changes from apparently intransigent positions to the making of concessions seems to be of common occurrence in such cases.

A noticeable feature of the conference was the absence of personal acrimony. Although the manager accused the

complainant of having set him up, there was no name calling or personal abuse. The conciliators stress the importance of keeping the discussion to what is said or what is done and the avoidance of gratuitous insults such as calling the respondent a racist which serves no purpose other than to alienate the party involved. The role of the Consultative Committee member, Ms Hall, was also constructive in that it was clear she was concerned with building bridges and promoting understanding across the racial boundary rather than with putting the respondents down.

In discussion later, the Chief Conciliator listed the following measures which, in his view, are most important in keeping tension to a minimum, and working toward a mutually acceptable outcome in compulsory conferences:

1. the preliminary 'footwork' in which the procedures are explained, the parties are given an opportunity to get to know the conciliators and to ventilate their feelings of anger and hostility;

2. the emphasis at all times on promoting communication and mutual understanding:

3. the fact that parties to conferences are allowed to bring a friend or supporter, but not a legal representative;

4. the comparatively relaxed, informal nature of conferences with regard to such matters as dress, time out for discussion and consultation and opportunity for any member of the conference to contribute as the occasion arises; and

5. the fact that the parties are allowed to fix their own terms of settlement with the conciliator contributing only insofar as he can help them to work out the details.

CHAPTER 8. WHEN SETTLEMENT IS NOT REACHED

The compulsory conference offers the last chance to settle the matter of the complaint short of court action. When the compulsory conference fails to yield a solution, the Commissioner is empowered to issue a certificate to the complainant on request stating that a compulsory conference has been held but the matter has not been settled. This certificate enables the complainant to seek a remedy in a civil action under s.25 of the Racial Discrimination Act.

Up to 30 June 1984, a total of thirty certificates involving fifteen matters have been issued. These involved complaints against government departments, hotel licensees and real estate agents.

Conciliation of complaints may fail for a variety of reasons. It may fail because the respondent denies the substance of the allegations; the person may assert that the events complained about did not in fact occur. This is always likely to happen when there are no third parties present who may act as witnesses.

A second situation in which conciliation may fail arises when the parties cannot agree on the terms of settlement. In such cases the events complained of are acknowledged by the respondent, but the complainant is not satisfied with the terms of redress offered by the respondent. This is a rare occurrence. Aboriginal complainants have almost invariably been magnanimous in their treatment of respondents, usually being prepared to settle for an apology and an undertaking not to repeat the discriminatory behaviour. The Commissioner for Community Relations in his 1981/82 report commented:

> Settlements achieved through conciliation reflect the lack of vindictiveness by Aboriginal complainants and

> their modest demands. There is no doubt that these attitudes are associated with the low position of Aborigines in the society. . At the time the Racial Discrimination Act came into operation in 1975 Aboriginal complainants had little expectation of justice and the respondents confronted with Aboriginals seeking even modest apologies and undertakings not to discriminate again, found it difficult in some cases to take the proceedings seriously and in other cases demonstrated arrogance, anger and resentment.
>
> Six years ago it was a revolutionary act to get a white man of power and affluence to say 'I'm sorry' to an Aboriginal, even when he knew he had broken the law by discriminating against him. Today there is a more widespread awareness among Aboriginal people of their rights and less inclination to accept less than a full measure of justice.[1]

If the Commissioner was correct in his assessment, and my impression from comments of informants suggests that he was, then we might expect that in the future it would be more difficult to settle complaints at the compulsory conference level and that more cases will proceed to civil action in the courts.[2]

A third situation in which conciliation procedure may fail occurs when there is a challenge to the constitutional validity of the Act and/or to whether the matter at issue falls within the ambit of the legislation. Two significant complaints from Aboriginal people against Queensland Government authorities relating to attempts to obtain title to land in that State belong in this category.

Two issues emerge from the discussion of situations in which it has not been possible to reach a conciliated settlement. The first is the failure of Aboriginal complainants to pursue their complaints in court action after being issued, at their request, with certificates enabling them to do so. The second is the general problem arising from attempts to enforce Commonwealth law against officials acting on behalf of State governments.

Failure to initiate court action

The fact that no case had been determined in the courts suggests a weakness in the current provisions of the legislation. Since the onus is on the complainants to initiate action, it must be assumed that there are some considerations which inhibit them from doing so.

Since the legal costs would be met through legal aid, lack of financial resources does not seem to be the critical factor. Other possibilities which may be more relevant are:

(1) the expected outcome of court action may not seem to be worth the trouble and stress involved in undertaking it;

(2) the complainant may have lost interest in a matter which has dragged on over months or even years;

(3) the task of initiating legal action and seeing it through may seem too complex and difficult for people who are relatively unsophisticated and who find the formal requirements of legal procedures difficult to comprehend.

Whatever may be the reasons for the failure of the complainants to proceed with the case after the issuing of the certificate, this lack of follow up action threatens to weaken the conciliation process. There can be little question that a major consideration for respondents in arriving at a conciliated settlement is the threat of an expensive legal action with the possible award of damages against them. This threat will lose much of its force if it becomes evident that complainants do not proceed with the matter when they (the respondents) refuse to settle. Some modification which would increase the likelihood of unsettled cases being brought to court would seem desirable.

Problems with officials

It is probable that the clarification by the High Court in 1982 of the validity of the Act and its application to the States will resolve many problems where state officials are concerned. Nevertheless it must be expected that at times complex situations will arise in the enforcement of Commonwealth legislation against such officials. The issues involved would seem to have something in common with those discussed by Fisher in his analysis of the process of obtaining compliance with international law. The comparison perhaps becomes somewhat more germane in so far as the Racial Discrimination Act was passed in order to meet a commitment to an international convention.

As Fisher points out the term 'compliance' is used in two quite different senses which are often confused in discussions of law enforcement. In his words:

> If the first basic of a law enforcement system is to cause compliance with standing rules, the second objective is to cause compliance with decisions that settle disputes by interpreting those rules and applying them to the facts of a case. The distinction between first order compliance (causing respect for standing rules) and second order compliance (causing respect for authoritative decisions) is frequently blurred, yet that distinction is of critical importance, particularly when one is seeking to enforce rules against governments and government officers.
>
> One could generalize and say that in the international community the existing pattern of first order compliance is fairly good. The critical problem is that there is no pattern of second order compliance; there is no orderly process by which disputes lead to decisions that then are followed.[5]

It is interesting to note that while Fisher's interest is in achieving compliance with international law, his arguments are based on the workings of constitutional law' where the imposition of sanctions on governments *(e.g.* in federal systems), or on officials acting on behalf of governments, for past offences is unusual. Thus he tells us:

> No one talks of punishing the United States Government for having unconstitutionally deprived a man of his passport. No one talks of punishing the State of Mississippi for having discriminated in the past in an unconstitutional fashion against blacks. No one even. suggests the necessity of converting a violation of the Constitution into a lesson for the future. The typical compliance that we have come to expect our courts to exact from our governments is compliance with decisions rather than compliance with standing orders.
>
> Within the field of second-order compliance experience with decisions prohibiting future illegal action has been longer and more successful than experience with decisions ordering governments to make amends for past violations of the law. A decision of the United States Supreme Court that the State of Georgia should compensate a plaintiff as a result of Georgia's having failed to fulfill its legal obligations in the past led to the prompt adoption of the eleventh amendment which barred federal courts from entering any more such decisions.[4]

For Fisher law enforcement is more than and quite different from coercion. Moreover, it should not be regarded as being designed to prevent or deal primarily with the more extreme violations of accepted norms of behaviour. As he puts it, 'the greatest talent of the law appears to be to deal with questions when they are small and to keep them small'. And he goes on to say:

> The primary task of the law is to avoid a maximum confrontation, not to handle it - to deal with disorder in an orderly way which tends to dampen rather than inflame it.
>
> Law is best understood not as an alternative to force or politics but as a way of structuring political forces.[5]

Fisher's line of argument is of interest to us on two grounds. The first is the parallel between the two areas of international law and constitutional law which he makes though in the reverse direction from that in which our interest lies. The second ground resides in the relatively new or formative aspect of both international law and human rights legislation which, as was noted above, stems largely from international commitments. Where law is formally established and of long standing as, for example, in the case of the criminal code, the enforcement of standing rules would seem to be

appropriate. The penalty for violation of the rules would be understood and accepted by society. In the case of law which is breaking new ground we would expect the emphasis to move towards requiring secondary compliance - that is, compliance with decisions arrived at in interpreting the new or developing rules and applying them to the particular case. Ir effect, what this means is that the emphasis would be on ensuring that any injury incurred or loss suffered by the aggrieved party would, as far as possible, be repaired and that there would be no recurrence of the unlawful act rather than on punitive action for the breach of the law.

CHAPTER 8 ENDNOTES

1. Human Rights Commission, *Annual report vol.2: report of the Commissioner for Community Relations*, AGPS, Canberra, 1982, pp. 15-16.

2. The settlement of a complaint of discrimination against an Aboriginal at a compulsory conference in Perth in December 1983 by payment of $15,000 and written personal apologies may be indicative of the future trend. (The financial settlement was in addition to $5000 payment for breach of contract paid before conciliation took place.)

3. R. Fisher, *Improving compliance with international law*, Press of Virginia, Charlottesville, 1981, pp. 28-9.

4. ibid., pp. 31-2.

5. ibid., pp. 15-16.

CHAPTER 9. SOME PERSPECTIVES ON THE OPERATION OF THE ACT

The purpose of the Racial Discrimination Act 1975 was to reduce - if not to eliminate - the incidence of racial discrimination. The obvious question to ask nine years after its passage, is whether or not it has achieved this objective. In particular, we can ask, what has been its contribution to relations between Aboriginal and non-Aboriginal members of the Australian community.

Apparently simple questions rarely lend themselves to equally simple answers. Even if it can be shown that there has been a sharp decrease in the incidence of overt discrimination against Aboriginal people since the promulgation of the Act - and there would seem to be very good reasons for concluding that such is the case - this would not establish that the application of the Act was responsible for the change. For some years, going back well beyond the time of the introduction of the legislation into Parliament, there have been forces at work bringing about change in Australia's , multicultural society. It would be difficult to disentangle the effects of the Act from the effects of these other events.

An impression of the impact of the legislation, as implemented by the staff of the Commissioner's Office, on relations between the two communities, can be gained by interviewing a cross-section of people directly affected by its provisions in parts of the country where the Act has been most thoroughly enforced. Such a survey was made during a sixteen day tour of the coastal and tableland areas of northern New South Wales and southern Queensland. In all, some fifteen country centres were visited and approximately seventy people were interviewed, either individually or in small groups. Some ten were members of an Indian (Sikh) community, and the remainder were split evenly between the Aboriginal and white groups.

The Aboriginal informants were mainly people who held formal position in Aboriginal organisations or were prominent in their local community, for which they often acted as spokespersons in discussions and negotiations with the local authorities. They included members of the National Aboriginal Conference, persons in charge of Aboriginal Development Commission office, members of the Aboriginal Legal Service, an administrative officer of an Aboriginal Medical Service and Area Officer of the Department of Aboriginal Affairs. Of the remainder, three had been complainants in compulsory conferences, while many of the local spokespersons served on consultative committees and had participated in roles supportive of complainants in compulsory conferences.

The non-Aboriginal informants included police officers of the rank of sergeant or above, officers of Area Offices of the Department of Aboriginal Affairs, clergy working with Aboriginal groups, estate agents who had some weeks previously been respondents in compulsory conferences, landlords who had also been respondents in conferences at the same time as the estate agents and hotel proprietors who had been respondents in past conferences dealing with refusal of service. Included were some nuns who were working with Aboriginals, a woman member of a town council who was active in the cause of Aboriginal development and a solicitor who has been involved in a racial discrimination case.

This diverse array of informants may be divided into four broad groups:

1. politically-oriented members of the Aboriginal community who favour strong legislation to outlaw acts of racial discrimination;

2. non-Aboriginal members of the business community - hotel proprietors, estate agents and landlords - who had been involved as respondents in compulsory conferences convened to settle complaints of racial discrimination;

3. members of the community - Aboriginal and non-Aboriginal - who were concerned with countering acts of discrimination occurring at the local level; and

4. members of the Police Forces of New South Wales and Queensland.

These different groups expressed divergent views on the Act and its implementation. Their respective positions can be summarised in broad terms.

The first group, including two members of the National Aboriginal Conference, considered that the Act was too weak and needed to be strengthened by the provision of penal sanctions against offenders. In their view, the Act, with its emphasis on conciliation and lack of punitive measures, did little to deter the members of the non-Aboriginal community , from continuing with their discriminatory behaviour.

One of these informants made the points that the Aboriginal people should have been consulted in the framing of the Act and that they also should have a role in implementing its provisions. There was, he said, a large Aboriginal 'industry' which provided careers for an army of white professional welfare workers and administrators who were living off the Aboriginals' backs. Not enough of the money spent on Aboriginal development was reaching them. He thought that the Office of the Commissioner was doing a very good job as far as it went, but the whole pattern was wrong. Aboriginals should have a greater role in determining their own destiny.

This particular informant did not like the emphasis on conciliation in the Act. Conciliation was fine as long as both parties felt good will toward each other. The trouble was that there was an imbalance in this respect. While some ninety per cent of Aboriginal people were pro-white, nowhere near ninety per cent of whites were pro-Aboriginal. This meant that, in negotiations with whites in various

conferences, the Aboriginals were soft in their demands while whites were hard, with the result that the latter invariably got the better deal.

The other main proponent of this view of the Act said that in his view the fact that there had been a reduction in the number of complaints of racial discrimination, in those areas where the Act had been policed for some years, was due not so much to a cessation of acts of discrimination as to the fact that Aboriginals no longer saw much point in laying complaints. There was a divergence between this interpretation and that expressed by members in the third group.

The second group, comprising persons who had been respondents in compulsory conferences to complaints of racial discrimination - with a couple of exceptions described the Act as a troublesome nuisance. They complained that the Act hampers them in the orderly and prudent management of their businesses. Thus the proprietor of a hotel in a provincial town said that he was quite happy to serve anyone of any race or religion as long as it was in his financial interest to do so. He had no racial preferences or objections in the matter. But, if there were Aboriginal people present in the bar, then the white patrons would leave. This was particularly the case if the Aboriginals became at all rowdy. The town was racist in outlook and, in his opinion, would remain so for another generation at least. Hoteliers such as himself were the meat in the sandwich. They *were* caught between the prejudices of the whites and the requirement that they serve Aboriginals.

This hotelier had been a respondent in two compulsory conferences in the past. He thought that on the first occasion he had been in the wrong, but that in the other case the position had not been so clear. So far as the field staff from the Commissioner's Office were concerned, they were very fair and were doing a conscientious job, but the job itself

was wrong. Publicans should have the right to run their hotels in an orderly and efficient manner in accordance with the licensing laws and should be able to refuse to serve anyone, who, in their judgement, seemed likely to cause trouble. Under the Racial Discrimination Act, they were restricted in the precautions they could take with respect to people who, after a few drinks, were likely to become bellicose and troublesome. The Act encouraged such people and made them more assertive and aggressive.

The hotelier just described conducted a hotel in the heart of the town and catered mainly for non-Aboriginal patrons. Another publican who had a hotel located on the outskirts of the town and close to an Aboriginal community, had a large Aboriginal clientele. His problem was not the loss of white patronage, but of damage to his hotel. He said that his Aboriginal patrons were likeable people and when they were sober he got on very well with them. But, when they had a few drinks they became aggressive and abusive. He gave instances of their behaviour when under the influence of alcohol, including abusing other patrons and damaging property. He said that such behaviour was not confined to Aboriginal people. Some of the worst damage to his hotel had been caused by white persons. But in the case of a white trouble-maker, one was usually dealing with only one man and that could be handled. Aboriginal people, however, stuck together. If there was trouble with one, then two or three of his mates would join in and if one managed to handle them they would go away and come back with a lot more of their friends. This, he said, made life very difficult.

Two estate agents were interviewed some two months after they had been respondents in compulsory conferences to settle complaints of racial discrimination in refusing to let an apartment to an Aboriginal person. Both were angry about having been directed to attend the conference. The first of these went into detailed explanations of why Aboriginal people often failed to get leases. These centred around their

appearance and their incomes. He said he had a points system on which he rated all his potential clients when he interviewed them at the front counter. This was based on appearance and the answers to a standard set of questions. If he was satisfied he then invited them into his office. He claimed he treated all comers alike. There were, he said, many applicants for any available accommodation and getting tenancy of a unit was a competitive business.

As far as the conference was concerned, he said that the officers who convened it had a job to do and did it perhaps a bit too well. This was said somewhat wryly. As he saw it, their job was to help Aboriginals. He had no complaints about their fairness, but thought the Aboriginals had been unfair to him. They deemed him to be guilty before he opened his mouth.

The other estate agent interviewed had strong feelings about being subjected to a complaint and a compulsory conference. He had in the past tried to help young Aboriginal people by training them in his office and later helped them to find placements in other agencies. However, he said, that was all over now. As he warmed to his subject in a lively and friendly discussion, he made the following points:

> It was a waste of taxpayers' money to send people up from Canberra to carpet him for something that was not racial discrimination but simply good business practice.
>
> Aboriginal people would be best served by being encouraged to work for themselves. Life was not easy for most people. Migrants, for example, had a lot to overcome but they got down to it and made their way in life. Life had not been easy for him.
>
> The Aboriginals should be taught to present themselves more effectively. He would not let a dwelling to someone of unconventional or untidy appearance irrespective of race membership.
>
> It was a simple fact of life that when an Aboriginal family bought a house the value of property in the immediate vicinity dropped sharply.

> The Government would be doing something much more useful for Aboriginals if it brought in legislation requiring the employment of a certain proportion of Aboriginals by employers of labour. It should set an example in its own employment practices.
>
> He thought that the officers in their handling of the conference had been very patient and accepting of his behaviour. He had given them a very bad time.
>
> He felt no personal animosity toward the Aboriginals who had participated it the conference. They had indeed been very gentle and not at all vindictive in their treatment of him.

This informant was a very interesting person to interview and in many ways responsive to the Aboriginal position. He Could *see* that prior to the advent of the Act, an Aboriginal person was in a no-win position when he or she encountered discrimination. He or she could accept it or become hostile and aggressive. The agent did wonder why the Aboriginals, who had an office close by, did not come in and Confront him when they had a grievance against him. It was suggested to him that now the ice had been broken and they had confronted him - in a not unkindly way - in the conference, perhaps they would be more ready to take things up with him in his office. He said he hoped they would.

The third group was by far the largest and most diverse in composition. Common features linking the members of this category were a shared concern for the elimination of racial discrimimation - particularly as directed against Aboriginal people - and a desire to promote harmonious community relations at the local level.

Many were members of Consultative Committees on Community Relations. Some had official positions in Aboriginal service agencies. Two were members of the Aboriginal Development Commission, two were members of the Aboriginal Legal Service, two were Area Office staff of the Department of Aboriginal Affairs and one was the Administrator of an Aboriginal Medical Service. There were several Aboriginals who had been involved

in compulsory conferences either as complainants or in support of complainants. There were also some non-Aboriginal persons active in promoting the welfare of Aboriginal people - clergy, nuns and interested citizens.

The prevailing stance within this group was one of strong support for the approach which had been adopted by the conciliators. Themes which recurred in discussions with different informants in widely separated areas were:

(a There had initially been some disappointment when the provisions of the Act became known. A stronger Act with greater powers of inquiry and enforcement of sanctions had been expected. It was thought unlikely that discrimination could be reduced without imposing penalties on offenders. However, as time went on and the conciliators began to make their presence felt, even those who would still like stronger legislation had come to respect what was being achieved. As one government officer put it 'I thought at first that their approach was not strong enough, but I'm very impressed at what they have been able to achieve in their low key way'.

What particularly impressed this officer and several other informants was the effectiveness of an approach of which the main feature was a patient and persistent pursuit of any complaints made by Aboriginals in the course of which the conciliators went back and forth among the parties concerned - Aboriginals, police, hotel proprietors, local community authorities and others - until the matters at issue had *been* ironed out and a resolution achieved.

In another centre, a staff member of the Aboriginal Development Commission expressed similar views in somewhat different terms. In evaluating the way the Act was being implemented he said he took his cue from the

local Aboriginal community. Initially, he said, they had been rather sceptical, but as they came around to valuing the work the conciliators were doing he had come around with them.

(b) Those Aboriginal informants who had taken part in compulsory conferences reported that this had been a valuable learning experience for them. For the most part they had entered such conferences with some trepidation as they expected emotions to become inflamed and foresaw the possibility of the conference breaking up in disorder with consequent deterioration in community relations. It came as a great relief to observe that the conciliators remained calm and had the situation in hand and that, even though feelings ran high at times, it was possible to work through to a satisfactory resolution of the issues.

These views were common both to those whose complaints initiated the conference and those who attended the conference in support of complainants. Among the latter was the administrator of an Aboriginal Medical Service who was also a member of the local Consultative Committee on Community Relations. She said she had gained alot from attending compulsory conferences and observing how the conciliator conducted them. She was impressed by the fact that they remained calm and reasonable Sven though others present became very heated. It had taught her a lot about the way to approach difficult issues arising in racial encounters. Now, she said, she and other members of the local Aboriginal community were able to solve most of their problems with police, hotel proprietors, teachers, estate agents and others on the basis of talking them through rationally with the parties concerned. As a result things had improved a Lot. There had been some very bad riots three years earlier which the conciliators had helped to settle down. At the time there had been very bad relations With the police, but,

as she put it, the police were now very good and they got on well together. The local township was not very open to Aboriginals. As she saw it, her community was very indebted to the Act and to the work of the conciliators in implementing it.

(c) Perhaps the most important contribution made by the Act was that it provided a legal basis on which discrimination could be confronted and the discriminator required to justify his or her conduct or acknowledge his or her fault. Prior to the legislation Aboriginal people were in a dependent position with no authority to which they could appeal when subjected to unfair treatment. Any complaints they might make were subject to arbitrary decisions by persons in authority who rarely had to justify their actions. But after the conciliation staff from the Commissioner's Office began appearing on the scene, things began to change. It became possible to challenge any actions whereby services or amenities which were available to citizens generally were denied because of racial status.

In other words the Act provided a basis on which equality of treatment could be demanded as a right and persons who denied that right could be confronted and exposed. The fact that the sanctions which could be imposed were limited seemed less important in the early years than this recognition that the Aboriginal had the right at law to claim equality with fellow non-Aboriginal citizens. The significance attached to this point of principle was manifest during the initial stages of the implementation of the Act, in the readiness of complainants to be satisfied with an acknowledgement of their rights and the tendering of an apology. As this recognition became more established, more substantial forms of redress came to be sought.

• (d) There had been a marked decline in overt acts of discrimination against Aboriginal people. This view was expressed by both Aboriginal and non-Aboriginal informants who claimed to have contact with local Aboriginal communities. Among the former were officers of the Aboriginal Development Commission and the Aboriginal Legal Service as well as Aboriginal members of Consultative Committees. Among the latter were area staff of the Department of Aboriginal Affairs and clergy of different denominations working with Aboriginal communities.

While none of these informants claimed that acts of racial discrimination no longer occurred or that there had been any marked change in covert attitudes, there was a general agreement that over recent years the lot of Aboriginal people had improved considerably. As one of the representatives of the Aboriginal Development Commission put it: 'People are now happier to be Aboriginal'.

While this trend seems to be part of a broadly based change in relations between the different sections of the Australian population, several comments were made to the effect that the local situation had improved after some incident involving the enforcement of the Act (e.g., that estate agents had begun letting accommodation to Aboriginals after one of their number had been a respondent in a compulsory conference).

(e) An interesting feature commented on by some of the more articulate and insightful informants was the fact that the direct personal confrontation of the conciliation process had a much stronger impact on the participants than would the more impersonal processes of court action. Thus an Aboriginal woman who had, some two months earlier, been through a series of compulsory conferences

in which she was a complainant against estate agents and landlords remarked on the value she had found in the experience.

She said she went into the first conference with some trepidation because she did not know how the situation might develop. She felt afraid that one of the estate agents or landlords might blow up and trigger a counter reaction in one Or more of the Aboriginals who attended the conference in her support. She thought that would be disastrous. She did not want a situation to arise in which relations between the Aboriginals and the respondents would become worse. It was the unknown that worried her, particularly the unknown limits of the anger that might emerge on both sides.

It soon became apparent, however, that the situation was well under control and this made her feel much more calm. Once she could relax she enjoyed the opportunity to speak directly to white people on an equal footing and to be able to explain to them just what it felt like to be discriminated against because of one's colour. It was a very good feeling to be able to speak as person to person on an equal footing with a white person and to know that one was being listened to. This was an experience that was new to her.

The result of the conference had been to give her more confidence in herself, and also in the possibilities of negotiation and conciliation when problems with members of the non-Aboriginal community arose. Compulsory conferences would hold no threats for her in the future, but more importantly, she felt she could now confront, in a quiet but firm way, any estate agent or other person she thought was discriminating against her because of her colour.

The Police

Discussions were held with some ten members of the police forces of the two states of New South Wales and Queensland. The officers ranged in rank from superintendent (1), inspectors (4) to sergeants (5),

The police share the interest of the Commissioner for Community Relations in the establishment and maintenance of harmonious relations between the different racial and ethnic groups. Indeed, as one senior police officer put it 'the police are concerned with the welfare of the whole community, both Aboriginal and white'. It is their claim that they do their job impartially and without fear or favour. This common interest is fully recognised by the staff of the Office who make a regular practice of calling on the local police in the different centres through which they pass.

Nevertheless, there have been elements of tension in the relations between the Commissioner's Office and police in different localities. Although there are Aboriginal police on reservations in Queensland, their authority does not extend beyond the boundaries of the reserves. The regular police forces of the States and the Commonwealth are drawn almost entirely fron the non-Aboriginal population with few Aboriginal members. It is understandable, therefore, that the Aboriginal people tend to see the police as being biased against them in any conflict with members of the non-Aboriginal community. Furthermore, it seems that, until recent years, the police treated Aboriginals in ways they would not have treated other members of society. Forceful entry into their homes without the formality of a search warrant was apparently by no means unknown.

The Commissioner's Office consistently sought to improve relations between the Aboriginal people and the police. An important aspect of this improvement of relations has been the

attempt to get Aboriginal people to take up any complaints they have with the police and to discuss the issues while they are still small, rather than to wait until they reach explosive proportions and result in violence. Such attempts at improving communication have in some cases involved calling compulsory conferences, in which the police have been respondents to allegations of racial discrimination. In other cases, police officers have been invited to conferences with Aboriginals and these conferences have then, with the consent of all concerned, been formally declared compulsory conferences in order to provide the protection afforded by the Act.

These procedures, while necessitating some very forthright confrontations, have resulted in the development of mutual respect and trust between the police and members of the Commissioner's staff. The relations between the Commissioner's staff on the one hand and the police officers on the other, are obviously cordial and characterised by the good humoured banter of people who are comfortable with each other. Invariably the police insisted that, since they had nothing to say about their visitors which they were not happy to say in their presence, the two officers I was accompanying should remain during any discussion of their work. In consequence, what transpired in such meetings was an airing of views about policy and practice in dealing with relations and tensions between Aboriginal and non-Aboriginal people.

The views expressed by the police ranged from firm endorsement of the approach adopted by the Commissioner's Office to a somewhat reluctant acknowledgement that, since its advent, relations between the communities had improved considerably and tensions had been reduced. Those who were least enthusiastic held to a conservative view that Aboriginal people needed supervision and firm guidelines, while those at the other extreme favoured the development of autonomous self-control and initiative in a context that allowed for freedom and self-management.

One of the problems which makes for breakdown in communications between police and Aboriginals is the movement of police from one area to another. A police sergeant or inspector may have reached a stage where there is a good understanding between him and the force he controls on the one hand, and the local Aboriginal people on the other, and then he is transferred to another district; or a young police officer sent out from the city may never have had any dealings with Aboriginal people and hence is unsure in his dealings with them. Such problems are appreciated in the field and the importance of establishing and maintaining channels of communication with the Aboriginal community, through the Office of the Commissioner or local consultative committees, is well recognised. Thus, a sergeant in charge of a station at a small centre frequented by Aboriginals from a nearby reservation was very glad to be informed of complaints of minor incidents of harassment of Aboriginals by his men. Such passing on of information about points of friction, without any individuals being named, seems to be part of the role of conciliators.

So far as could be judged from the perspective of an observer at discussions with police officers, there has been a significant movement away from a confrontationist approach in relationships between Aboriginals and police to a co-operative attempt to resolve issues at an early stage before they have become inflamed. This is a two-sided understanding. As one senior police officer put it, he has no hesitation in dropping into the office of the local representative of the Aboriginal Legal Service, and that representative will call into his office whenever an issue than can be resolved by their joint efforts arises.

An overview

Since the informants range over a broad spectrum in terms of their roles in the wider society, it is hardly surprising that

there is some divergence in their stances toward the Racial Discrimination Act. Those Aboriginals who see improvement in the lot of their people as being dependent upon political action want 'strong' legislation which will impose change from above. They are sceptical of approaches which rely upon the good will of the members of the non-Aboriginal community and regard the emphasis in the Act on conciliation, rather than on the use of punitive measures, as a softness approaching acceptance of racial discrimination. While they acknowledge the sincere and conscientious nature of the efforts of the Community Relations staff to help their people in the struggle for equality, they see these efforts as being limited by the powers available.

At the other extreme are those non-Aboriginal entrepreneurs who resent the Act as an intrusion into the management of their businesses. While they see the majority of Aboriginals as friendly and co-operative people, they see a minority as trouble-makers out to change the established order of things. For these people, Aboriginals are fine in their place, but that place is not within intimate circles of white fraternisation as in clubs, hotels, discos or neighbourhood groups.

Between these two extreme positions there seems to be a substantial body of opinion that the Act, where it has been implemented for some years by the Community Relations staff, has been much more effective in changing behaviour than was initially predicted. This outcome was seen by an officer of the Aboriginal Legal Service, who spoke of the difficulties he encountered when he set up his office in a large provincial centre some years before the promulgation of the Act, as having been achieved by bringing about effective face to face communication between Aboriginals and whites. In his view the effective ingredients in the process were:

(1) the use of the compulsory conference;

(2) the avoidance of a moralistic 'blaming' approach and the putting of the emphasis on what actually happened;

(3) the process of keeping the level of anxiety as low as possible and the meeting of hostility with calmness and reasonableness instead of giving vent to emotional reactions;

(4) persistent and continuous support for the local Consultative Committee on Community Relations.

It would seem that such measures have made a useful contribution at the level of local community action in the promotion of constructive working relations between the different groups.

CHAPTER 10. CONSULTATIVE COMMITTEES ON COMMUNITY RELATIONS

Perhaps the most interesting innovation in the early work of the Office was the formation of Consultative Committees on Community Relations. These Committees, which form a pattern across the country from Brisbane to Perth and from Cairns to Hobart, constitute a direct link between the Commissioner and Human Rights Commission staff in Canberra and each of the local communities in which they are established. They perform several roles in the promotion of community relations including that of conciliating complaints either on their own initiative or on request from the Commissioner.

In 1980-81, 'some 20% of all cases lodged ... [were] resolved through the good offices of the Committees'.[1] Elsewhere we are told, in respect of the Committees:

> All have assisted in inquiries into complaints of racial discrimination and in settling the matters to which they related. They have had a large measure of success within their local communities, thus confirming the community oriented strategy I have developed for the combat and prevention of racial discrimination.
>
> The strategy is based on the premise that the best agent for combating racial discrimination and tackling the prejudice that gives rise to it is the local community itself. The people on the spot have an indispensable knowledge of the local climate of race relations and an awareness of the relationships and personalities that need to be taken into account in trying to effect improvements in community attitudes and behaviour.
>
> The Consultative Committees that have been established consist of concerned people, both black and white, with a capacity for effective communication within a whole community in the interests of minimising tensions and aggression. The approach of the Committees is to seek a settlement of complaints in the interests of all parties and the community itself. They have as their objective the development of harmonious relationships between racial and ethnic groups and the fostering of 'understanding, tolerance and friendship' within the local community...

Our records indicate that Committees have successfully pursued conciliation, relating with considerable success[113] to complainants and respondents alike. During the time the committees have been in operation they have

> demonstrated their ability to exercise a responsible role in the interests of the whole community.[2]

The Committees vary greatly in their origins, the nature and size of their membership and their resources in terms of the professional expertise at their disposal. While in a capital city such as Hobart, the Committee would be likely to include persons from the legal, industrial, commercial and social work areas, other Committees scattered through country areas might consist of no more than two or three citizens of very modest material resources and possibly all drawn from the Aboriginal community.

The first Consultative Committee was established in 1976 when the good offices of a resident of a coastal city in northern New South Wales were sought to inquire into and resolve a complaint. As of June 30, 1983, there were thirteen Consultative Committees throughout Australia, of which six were in Queensland.

There is no set procedure for the establishment of a Consultative Committee on Community Relations. The basic requirement is a nucleus of people dedicated to the cause of community relations and to the combating of racial discrimination. Some Committees (e.g. those of Lismore, Perth and Rockhampton) were based on, and supported by, religious bodies or institutions. In Hobart, the Good Neighbour Council took the initiative in establishing a committee. For the most part, however, the Committees had no institutional support but consisted solely of concerned citizens who came together to work for more equitable and more harmonious community relations.

Initially no financial support was provided for the Committees. All that the Commissioner was able to make available to each Committee was some notepaper, the right to

reverse telephone charges when contacting the Office on a matter of racial discrimination, and a card with his signature requesting assistance for the bearer on his behalf. Later, the Human Rights Commission was able to make available funds for out of pocket expenses in appropriate circumstances.

The Consultative Committees served the Office by providing:

(1) 4 presence in the local community;

(2) a channel of communication between the different racial or ethnic groups in the community;

(3) a channel of communication between the local community and the Office; ;

a local Agency for the settlement of disputes in respect Of radial issues and for the fostering of harmonious group relations.

A local presence

The Commissioner took the view that the mere presence of a group, dedicated to combating racism and having an official standing through its direct access to a central government office, acted As a deterrent to the more obvious and more extreme forms of racial discrimination. Such a group could confront discrimination directly, publicize it locally through the media or refer it to the Commissioner. The following report from the Hervey Bay - Maryborough Committee illustrates the significance of the 'presence' role:

> Since the formation of the Committee last year it has investigated a number of claims by black people in ,respect to discrimination.
>
> The first concerned a young woman of Aboriginal descent who complained that a neighbour was subjecting her to harassment personally and organising assaults on her child on a school bus. She and her daughter had had to

> put up with name calling and abuse over several months, and she was suffering ill health as a result.
>
> Two members of the Committee visited her in her home in Maryborough twice, and it was decided to highlight her case through the local newspaper, raising the question of racial discrimination generally and this case in particular. This had the desired effect of stopping the attacks and there has been no complaint in that regard since.[3],

The report goes on to discuss the Committee's inquiries into complaints of discrimination by estate agents, in hotel service and related areas.

A local channel of communication

The promotion of community relations depends upon communication between different sections of the community. Where there are differences in language or culture it is all too easy for groups to become separated from each other with little contact across the dividing boundaries. Under such conditions misunderstandings, mutual suspicion and conflict are to be expected. When conflict does occur, the lack of adequate channels of communication impedes its resolution.

By providing a means of communication between groups - preferably by having a mixed membership representing the different sections of the community - Consultative Committees foster intergroup co-operation and understanding and provide a means for dealing with disputes as they arise.

A channel of communication between community and office

With its small staff and wide domain, the only way in which the early Office could keep in contact with events in the local communities was through a network of local agencies such as the Committees. By keeping the Commissioner informed of developments, they enabled him to use the limited resources of the Office to the best advantage.

But to come back to the Park Hotel - just again to fill you in on a little bit of the background - the attitudes in...were pretty strongly steeped as far as racism was concerned and I still think they are now. The only difference in those days was that the Aboriginal people did need us to help them fight their battles. These days Aboriginal people are using their own resources and they are tackling a lot of their fights on their own and they just come to us for that little bit of extra support, which is a very good stage to have reached.

But to the Park Hotel. I received a complaint from three Aboriginal people who came round to the house just to say that they had been sitting in the Park Hotel having a quiet drink. They had walked in and had... [interruption in tape]. It was a very unpleasant business. They sat down feeling quite at ease. One of them had gone over to the bar and asked for one Orchy and two beers (I think that is what it was) and he had picked up the drinks, taken them back to the table. Then a few minutes later the manager, Mr Williams, came and stood by the table and said 'good afternoon, boys' and they said good afternoon back to him and one of them said it was hot and he said, 'yes it was', and he said, 'well just finish those drinks you have got and leave'.

As you can imagine there was rather a stunned silence and the three fellows looked at him and said, 'why?' and he said, 'I do not have to tell you why, just leave'. So they got rather agitated. Then one of them got up and walked towards the manager who backed away from him and went into his office and this fellow walked after him to the office and said, 'what is going on here?' The manager said, 'I am going to ring the police'. And the fellow said, 'you do that, I want to speak to the police too'. He followed the manager into the office and of course there in the office drinking was the Inspector of Police, the local Inspector. The Aboriginal fellow sort of appealed to him to see that fair play was done and the Police Inspector just told him to get out before there was any trouble. The three Aborigines then left. As they left the paddywagon drew up and they spoke to the constable in the van who jut said, 'look, go, I'll just say I didn't see you'. So they left then, and of course came straight to *see* me.

Anyway, a complaint was passed on to George who then rang me up and said that they were issuing a statement to say he had to attend a compulsory conference. George said to me that it would be much better if I delivered these papers by hand, that one was to go to him, one was to go to the Police Inspector. I duly said, yes I would because I was too much of a coward to say no, I wouldn't, but I must admit it was really...I was feeling extremely nervous and ill at ease.

The paper duly arrived and I went down to the Park Hotel, was shown through to where Mr Williams was waiting in his

Office. He smiled. He was sitting behind his desk and he smiled at me quite politely and said, you know, 'how do you do?' back, and said that I had to serve this notice on him. I handed him the letter which of course stated that after the incident.'.explained what had happened, he was being summoned to attend the compulsory conference. There was a little pause and he just said, "Oh, you have to realise that I have a lot of trouble with Aboriginal people; the amount of damage that goes on here is astronomical and nobody understands the plight I am in'. He was quite quiet at this stage, and I just sort of nodded my head, and he was still holding his paper there and I said to him 'Oh, thank you, goodbye'. I turned to walk away to the door, and as I got to the door I suddenly heard this voice shouting out in quite a hysterical fashion, 'You're banned of course you realise you're banned'. I turned round with amazement all over my face because I couldn't believe for one minute that he was talking to me. I was glancing around the room to see who he could have been speaking to, and then I realised he really was speaking to me. He was looking very, very angry and very threatening so I didn't hang around. I just stood there for 'a second and turned round and walked out, and .I was shaking.

I really was quite upset because I guess I am one of the lucky people. I am not used to being spoken to in such an aggressive fashion, and I am certainly not used to being banned from hotels. Anyway I sat down in the car and I thought, well if I go home now I will lose all my courage as far as going round to the inspector is concerned, because he was a person I didn't like, I didn't trust. I felt that he could be very unpleasant if he chose. Anyway, I gather my rather tattered courage round me and off I went down to the police station. I went into the police station. The constable was on duty, and I asked him if I could speak to Inspector Marsh and he said to me, no, he was off in his cottage. He said, 'what is it about', so I handed the thing to him and I said 'I have to deliver this to him in person'. So the police constable said, 'All right, I'll get him for you'. He rang the inspector and the inspector walked in looking, very, very cold and very hostile and I handed him the form which he duly read and that was that. I left then and went home, and I was hoping and praying that I would never hear anything more about any of it again, but of course that was not going to happen.

I felt at least that I had done what I ought to do and that was handing these papers over and now it was up to George. I told George what had happened and the Aborigines and George and my daughter, all thought it was a huge joke, me being banned from the Park Hotel. I think it has probably been my one claim to fame. Jenny wanted to go straight back to the pub so she could see me being kicked out. Anyway, the attitude of people towards me was rather interesting. They obviously felt that I was somewhat of a queer person. I was odd. This wishing

to be involved with Aboriginal people. They agreed that maybe life wasn't as good as it should *be* for the Aborigines, but they certainly weren't sufficiently worried to stand up and put themselves in the sort of position I was being put into. Nor did I feel they were prepared to actually support me, not in those days anyway ...

[In this case the matter was settled, at the request of the complainants, for payment to them of a total of $1000.]

Well, after the Park Hotel business, rather than going into voluntary liquidation, we didn't do very much. We certainly didn't go round looking for work. Sr. Ruth left and Bruce Walsh was busy about his affairs and I just couldn't find anyone to come along with me. There were just not enough white people that I knew anyway who were sufficiently sympathetic to the cause and the Aboriginal people had not reached the stage...a lot of them did not wish to rock the boat. I think they felt they were more likely to be dragging coals upon their heads if they complained than if they didn't complain.

Anyway, things were pretty quiet for quite a while. It may be that Aboriginal people were getting a little more confident to stand up to people. I have noticed a tremendous change in ... over the thirty years I've been here. I can remember quite clearly when we first came to live here, it was quite normal for Aboriginal women in shops to remain standing at the back of people waiting to be served. She would remain there until such time as it would *be* easy for her to be served at the counter without appearing to be in anyone's way. And I would always say, 'look stand forward, it's your turn', because unless a white person made an effort to make sure that an Aboriginal person didn't stand back and wait on a white person, then the Aboriginal people would wait. And of course in those days the Reserve here, there was a gate at the entrance saying that people were not allowed inside unless they saw the manager first. Protectionism was very much at its height then.

These days you would never see Aboriginal people standing other than shoulder to shoulder with white people wherever they are. I feel that they are developing a much greater pride in their race and they certainly are not about to be put down the way they used to be.

Then in October 1980, there was the unpleasant National Hotel riot where a group of Aborigines were drinking in the National Hotel and they got rather rowdy. The proprietor asked them to leave, and they refused. Glasses were broken. Then immediately the police were called. It was a very unpleasant confrontation between about thirty Aborigines and I think about twenty police. I wasn't actually involved in that aspect of it.

The next day three Aboriginal men, who had not been near the Hotel while all this brawling was going on, went into the National Hotel, because a lot of Aboriginal people drank there. They went in - it was raining and they couldn't get out to work - to get a beer. And when they got to the counter the proprietor just said, 'look we are not serving you people, you have got to go'. And the men said, 'why aren't you serving? You serve these white people sitting here'. The proprietor said it didn't matter, that he wasn't serving them and they had to get out. So they were very angry, and they immediately put in a complaint and we served notice on the owner of the National Hotel. George appeared on the scene and we had a meeting in the Council Chambers with the licensee, the owner, and the three Aboriginal people, George and myself.

And that was quite an interesting exercise as far as I was concerned because I could see both points of view. The three Aboriginal men were justifiably very angry; they felt they had been humiliated, which they had, in front of white people, and they were being humiliated in front of their own people, and they had just had enough. As one Aboriginal fellow said, it was only the week before he had been into the National Hotel where there had been some brawl going on and once again, because it was a brawl involving Aboriginal people, he was told that he wasn't being served and he said he had had enough.

The owner said he had been serving the white people and suddenly in through the door came the cameramen of one of the television stations, and he was so upset that he told the cameramen to get out. Then he decided he would close the pub and at that stage the Aboriginal people arrived on the scene. Well, we sort of said it wasn't up to us really to decide the truth of what he was saying, but what we were saying was that he had no right to ban the Aboriginal people who had walked in, or rather to refuse to serve them at that stage when it was obvious that in their eyes it looked as though they were being discriminated against. We argued for quite a long time on this point. The owner couldn't understand at all why anybody would say he was discriminating. Various incidents were pointed out to him by the Aboriginal people which showed that he had been singling out Aboriginal people, but it was very obvious that he just couldn't perceive this. I think it's the old case that there are none so blind as those who don't wish to see.

Anyway, that meeting dragged on all day long, but eventually he was asked to apologise and he said, yes, that he would apologise. But when it was to be printed in the paper, he wasn't very happy about that. And the three complainants said that they didn't want just a straight out apology - they wanted money. I think that they felt that as money was obviously very important to white people, then they were going to make him feel very sore about what had happened and the main way they felt

> would be to extract money out of him. So there was an agreement that he would pay them so much money each and that was the end of that case.
>
> Well.. .after that, as we had not been re.'-convened, George again called us together and the meeting was enlarged. We met with Inspector Lawson from the local police, the President of the Shire, and a few other Aboriginal and white people and we had some quite good discussions.

The account goes on to discuss some issues involving the well-being of the Aboriginal community that were discussed and dealt with. It continues:

> We have reached the stage now in...that I believe we have gone through quite a period of :'growth' for want of a better expression. I think the Aborigines here are becoming far more confident, using their own resources. I think various things that are happening such as the committee that has just been set up by.. .Council. The Aboriginal Advisory Committee, which has now met three times, the fourth time will be next month, is helping a lot in Aboriginal relationships with the power structures in the community. There is no doubt that a lot of the councillors have never really spoken to Aboriginal people. They had had them perhaps as workers, on their place and they had the usual paternal attitude. 'You had good Aboriginal workers way back in the old days. —you know I had somebody, he was marvellous and we couldn't do enough for him, or he for us, but these days Aborigines are different.' And the fact that it is necessary for Aborigines to be different from what they were in those days, is something which has to be learned by a lot of white people in the community. And I think this Advisory Committee is now giving a lot of people, like the councillors, the opportunity to really sit and listen to what Aboriginal people have to say and the enormous problems they have to cope with.

Among the gains which the account goes on to list are the election of an Aboriginal to both the local hospital board and the local Housing Commission committee. Some closing comments are:

> To come back to our Committee, I feel that I have probably said enough to you now. I think that we have matured a lot. I know I've certainly grown in confidence and have got a much sharper appreciation of the sort of problems that Aboriginal people are daily confronted with and I am more alert now to white people expressing attitudes that are very racist. I don't let very much pass me by. I think that our Police Inspector has

> matured tremendously with his experiences with us. He can even crack jokes with us now, which he certainly didn't used to do in the past because I think he felt we were out to expose all the weak spots in the police system, which of course we are. But we are not doing it in a particularly aggressive or pugnacious fashion, and because he is a very good person at heart, he now appreciates that the best way to stop us exposing these weaknesses is for him to get rid of the weaknesses which is what he does.
>
> I don't feel there is very much more I can say to you now; I think I've mentioned the.. .Aboriginal Advisory Committee which I feel is going to do great things. It has representatives from the different Aboriginal settlements throughout the Shire. It also has representatives from the various Aboriginal government departments so that when they are telling the Aboriginal people in one village one thing and the Shire another thing, they will now have to commit themselves in front of everyone. And records are kept and then at the next meeting it can be said, that well, you said quite likely that the water supply at was going to be increased by April and it's now September, and it's not done. Why not?
>
> George's guidance has been invaluable. We certainly owe him a great deal. We would not be in the strong position that we are in now if it hadn't been for his continued, very strong interest in our progress. I think it was George who perceived the need for publicity. Well, now we take most opportunities to make our presence known.

This is a highly personal account of a Consultative Committee which had its origins at the beginning of activity in the field by the Office of the Commissioner. It is a committee in which non-Aboriginal participation was prominent, particularly in its formation, though key figures in the Aboriginal community have been active members for some years. As was pointed out above, in other centres leadership and initiative in the Consultative Committees - and sometimes the whole membership - is provided by Aboriginals.

As an example of a very active committee under Aboriginal leadership we have the Bundaberg Consultative Committee. Although the Bundaberg Consultative Committee on Community Relations came into existence formally on 14 February 1983 when it adopted a constitution and elected office bearers, an informal group had in fact existed for some years based on the

Bundaberg District Aboriginal and Islanders Housing Advancement Co-operative Ltd. This organisation constituted a point of contact for the Commissioner and Commission staff in repect of community relations in the area. The person through whom that contact was initially established was Mrs Norma Sarra, who dates her involvement in such matters to events going back to October 1974.

In that year the Regional Council for Social Development (RCSD) was formed in Bundaberg and Wide Bay and a community development officer was appointed. This officer, Merle Wagner, gained the trust of Norma Sarra who, in her own words, was 'a very shy Aboriginal mother of ten children' and who 'at that time...still had my misgivings of white people'. She goes on to tell us that 'with Merle's support I was elected to the committee of the RCSD, and was the only black person on it, and after attending meetings and workshops with groups all over the Wide Bay area, we all realised we were of the same mind and we needed to educate each other and the rest of the community'. [Personal communication]

About this time the Aboriginal and Islander Catholic Council was formed and Norma Sarra regularly attended its meetings. Through this organisation, she came into contact with members of the Community Relations staff and became associated with them in educational and conciliation-oriented activities. Those years during the middle and late seventies were very significant ones for her for, as she puts it, 'I was finding my own identity and was building my self confidence. I started to do a lot of voluntary work and continued to go to workshops and meetings'. They were also difficult times within the housing society where internal divisions developed that took some time to resolve.

Although, in the course of giving talks and attending meetings to outline problems which Aboriginals encountered, she had tried to establish a formal Consultative Committee, it was not

beliefs of the community as a whole, the settlement of individual complaints would be an uncoordinated repair system in which the casualties would be patched up, but nothing done to reduce their incidence. For a change strategy to be effective it is necessary that the two aspects be integrated into a consistent and coherent policy.

To the extent that they have provided A means whereby this integration can be effected, the Consultative Committees have made a significant contribution to the cause of community relations. Although, as was indicated above, they vary greatly in composition and the resources available to them, the Committees have undertaken broadly similar tasks in confronting racial discrimination.

CHAPTER 10 ENDNOTES

1. Commissioner for Community Relations, *Sixth annual report 1980-81*, AGPS, Canberra, 1981, p.65.

2. Commissioner for Community Relations, *Third annual report 1978*, AGPS, Canberra, 1978, pp.6-7.

3. Commissioner for Community Relations, *Fourth annual report 1979*, AGPS, Canberra, 1979, p.120.

4. *Bundaberg News Mail*, 29 September 1983.

5. i b i d .

CHAPTER 11. THREE APPROACHES TO CONCILIATION

In Chapter 3 an attempt was made to develop an orderly account of forms of third party intervention aimed at settling disputes. The approach was based on an examination of such intervention in terms of the degree to which the third party was responsible for determining the terms of settlement of matters in dispute. In that discussion, four levels of intervention were distinguished - intercession, mediation, conciliation and arbitration. While it was noted that intercession (the making of representations on behalf of another) and arbitration (the making of an award by an arbitrator or tribunal) could be clearly distinguished from the other processes, the line of demarcation between mediation and conciliation was much less clear and, in practice, the terms are often used interchangeably.

In this chapter we will be concerned with practical aspects of third party intervention in the area of mediation and conciliation. Our interest is in the use of these processes to implement legislation designed for the protection of human rights and the promotion of harmonious community relations.

We will be considering three approaches towards these ends and will be particularly interested in the relations between the objectives aimed at, the situational demands and the strategies adopted.

The three approaches to be compared here are those of:

(1) the Community Justice Centres established in New South Wales;

(2) the South Australian Commissioner for Equal Opportunity under the *Sex* Discrimination Act 1975 (S.A.) and the Handicapped Persons Equal Opportunity Act 1981 (S.A.); and

(3) the Commissioner for Community Relations under the Racial Discrimination Act 1975.

These approaches have been chosen for discussion because in each case:

(a) there is a strong commitment to reaching a settlement of disputes by conciliatory means rather than by bringing the matter before a tribunal for decision;

(b) a systematic and orderly procedure has been developed for pursuing a conciliated settlement;

(c) there are interesting similarities and differences between the approaches which point up the relevance of different variables.

The Community Justice Centres

Under legislation passed by the New South Wales State Parliament - the Community Justice Centres (Pilot Project) Act 1980 - three pilot Community Justice Centres were established in New South Wales in December 1980. They were based at Bankstown, Surry Hills and Wollongong.

The Law Foundation of New south Wales was requested by the New South Wales Attorney-General to undertake the role of statutory evaluator of the project. The Board of the Foundation agreed to this request and asked staff members John Schwartzkoff and Jennifer Morgan to undertake the project as part of their usual duties as staff researchers. They were later assisted in the task by Concetta Rizzo, who was employed on the Foundation's staff as a statistician. Their comprehensive report was published by the Foundation with the title *Community Justice Centres: a report on the New South Wales pilot project, 1979-81.*[1] The following account of the conciliatory practices employed in the Community Justice Centres is drawn almost entirely from this publication. I have also visited the Centre at Surry Hills, observed a role play of a 'mediation' sessions by two competent 'mediators', read the detailed training syllabus prepared by Mr Clive

Graham and discussed the policy and practice of the Centres with the Surry Hills staff, Mr Graham and the 'mediators' who were kind enough to demonstrate their work.

The objective of the Community Justice Centres (CJCs), as adopted by the Coordinating Committee set up to oversee the implementation of the pilot scheme, was:

> to establish a community mechanism to meet the need for relatively inexpensive, expeditious and fair resolution of disputes between parties involved in ongoing relationships.[2]

Examples of ongoing relationships are those between family or kin, between neighbours, between fellow workers and between landlord and tenant. The existence of such an ongoing relationship is the *sine qua non* of participation by the CJCs in dispute resolution. It is the only specific limitation on the cases which the Centres can handle. The Centres may, however, refuse to handle cases on various other grounds such as the existence of an alternative agency or alternative means designed specifically for handling the type of case involved.

The Act specified that the use of the CJCs

> shall be voluntary, that no legal force shall attach to any CJC agreement; nothing said or written in the course of contact with a Community Justice Centre shall give rise to legal rights or duties.[3]

That is, the task of the Centres is not to make awards or decisions but to assist the dissenting parties to arrive at a mutually acceptable settlement. The means whereby this is attempted is called 'mediation'. This term will be used, though, for reasons indicated in the Appendix, I consider it inappropriate.

This program was a fifty-four hour course

> based on a common syllabus prepared by Clive Graham (Head of TAFE's Division of Social Sciences and a member of the Co-ordinating Committee) in consultation with the CJC Education Sub-committee.4

In preparing the syllabus, Graham drew on information gathered on a visit in early 1980 to the United States where he studied training programs for mediators undertaking similar work. The course was conducted on the basis of a weekly three hour session spread over eighteen weeks.

The basic teaching strategy was the use of role-playing. Hypothetical situations involving disputes would be proposed and acted out with some students taking the roles of the principals and some those of the mediators. In some cases the role-plays were scripted in considerable detail, while in others only a basic outline was given and the participating students were left to develop the scenario at their discretion.

While there was some variation in teaching styles and procedures at the different training centres (Redfern, Wollongong and Bankstown), there was an emphasis in the training program on a uniform and specific mediation procedure as the core of all course. In this standard core the students were taught to conduct the mediation systematically through the following stages:

1. Introduction - explaining the nature and purpose of mediation, laying down ground rules.
2 The presenting party tells his or her side of the story without interruption from the other party.
3 The other party does likewise.
4 A mediator summarises the issues as they have been presented.
5. Transition (i) - the two parties relate directly to each other.
6. Caucus - an optional conference between each party and the mediator(s) in the absence of the other party.
7. Transition (ii) - the parties again communicate directly with each other; ideally they are by this stage moving towards agreement.
8. Further negotiation directed towards an agreement involving both mediator(s) and parties.

Agreement Written down and signed by both parties and the mediator(s).[5]

Although this sequence was to be systematically followed, the students were expected to put it into effect in a natural and smoothly flowing way, rather than in a ritualistic and wooden manner.: Much of the training involved the cultivation of skill in this regard. For instance, at Transition (i), the 'mediator(s) have the task of moving the discussion from statements, largely directed at themselves, to a direct interaction between the principals in which they communicate to each other their feelings about the matters at issue. This direct communication between the disputants concerning the personal meaning the events in question have for each, is seen as the critical component of the mediation process. It is quite difficult to bring about. Insofar as it oan__be successfully accomplished, it opens the way for mutual understanding and cooperation in the ongoing relationship.

This point recurs through the report. We may note its relevance to the development of thinking about the role of the 'caucus'. In preparing the training syllabus, caucus was envisaged as an integral part of the mediation process. It was thought that the principals would be more willing to indicate how much they were prepared to concede in the absence of the other party, and hence the mediators would be able to work more effectively towards a settlement. In the training program, students were encouraged to use caucus when an impasse seemed to have been reached. But, as the course proceeded, it became evident that there was a temptation for the trainees to resort to caucus whenever they were at a loss as to what to do next.

In consequence, by the middle of the first training course, resort to caucus came to be seen as a departure from the mediation model rather than an integral part of it. The essence of mediation was deemed to be the direct exchange taking place between the principals during and after the transition stage. As the report states:

> One of the supposed advantages of CJC mediation is that it may provide the first opportunity, or the first for some time, for the two parties actually to talk to each other. One of the important skills of a mediator is thus to facilitate this happening, and in a constructive fashion; he or she should not dominate the mediation process, and should not over emphasise the desirability of resolving all issues between the parties. The most positive thing to come out of a mediation session, indeed, may not be an agreement on the specific issues raised at all, but rather a basis for future communication over this or other bones of contention.[6]

The report makes the point that it is not easy to specify the personal qualities that make a good mediator. We are told:

> Characteristics or skills mentioned from time to time include the capacity to remain impartial, being an effective listener, the ability to create rapport or empathy, being fluent or articulate, being calm, self-controlled, mature, intelligent, non-judgmental in attitudes, flexible and tolerant, sensitive, capable of forcefulness when appropriate, displaying integrity.[7]

As this catalogue of virtues suggests, the mediator's role is a complex one which requires both that firm control is maintained and, at the same time, an open expression of feelings is promoted. On the one hand the mediator is required to be assertive in preventing communication between the parties degenerating into 'an unending stream of abuse'.[8] On the other the mediator is required to promote an informal, non-evasive, free flowing exchange. The mediators themselves are apparently aware of a certain incongruity between the ideal of a non-directive mediation model and the practical demands of actual concrete situations. The issues involved, which are complex, are by no means unknown to psychotherapists. What is at issue is the nature of interpersonal influence - an issue I have discussed elsewhere[9], but which is beyond the scope of the present discussion.

A mediation usually consists of one session which typically lasts about three hours. The research team which produced the Report was given approval to sit in on a number of mediation sessions and observed a total of some twenty mediations spread over the three Centres in late 1981 and early 1982. Only one

observer was present at any one mediation. Their observations make the following points:

(1) The atmosphere was informal. The parties Were asked how they wished to be addressed and first names of both parties and mediators were often used. Tea and coffee were frequently prepared by the mediators and offered to clients at appropriate times (e .g. when there was a break for a caucus session).

(2) Limits on acceptable behaviour seemed to be set by the parties rather than by the mediators. Smoking or the use of colloquial or obscene language was allowed unless one of the parties seemed inconvenienced by it Seating was arranged to simplify communication and to stress the equality of all participants.

(3) Sessions began with introductions and explanation by one of the mediators of the way the meeting would proceed. Any queries or confusions on the part of the principals were dealt with. The voluntary nature of the process was emphasised and the parties advised that they were free to leave at any time and that it was up to them whether or not an agreement was reached. The confidential nature of the session was stressed.

(4) The mediators in general seemed to act in an even-handed way and to avoid imposing their own ideas and solutions. Although the sessions were sometimes stormy,

> disputants seemed to relate well to the mediators, to understand readily the process that was suggested to them, and generally to find little difficulty in accepting the centre's *modus operandi*.[1°]

(5) Although, from the observer's viewpoint, likely terms of settlement often seemed obvious from the outset, the mediators were not deterred from following through the prescribed step by step procedure so that any agreement reached emerged 'in the light of a full exchange between the parties'.11

(6) Agreements reached did not necessarily directly address the issues originally raised. What resulted might be an agreement as to how the issues might be dealt with on a longer term basis. Whatever terms of settlement were reached

> were usually drafted on paper 'by 'one of the mediators, and discussed in detail with the parties before a final version was Written Out on the appropriate CJC form, and signed then and there: by all present)-[2]

(7) As might be expected, the observers found Some mediators who were deficient in their skills and others who were highly proficient. On the critical side we find this comment:

> The most obvious general Criticism that could be made of the mediators whom the researchers saw in action was that some tendedto use the process in a pedestrian and inflexible Way, as if expecting the simple application of formulae and the indantation of set phrases to enable the parties to sort through the matters At issue. AS had often been the case inrole-plays during training, Mediators Sotetites seemed to move from one stage of the processto,the next simply because they were unable to think'what else to do. It seemed to the observers, too, that the mediators sometimes rushed the proceedings, in the sense that they moved directly from one stage to the next, without taking time out to collect their thoughts or to confer with each other on how the session was progressing and what approaches might now be mOst prodUctive.[13]

On the positive side they report:

> Some mediators ... showed considerable skill, imagination and energy in the way they used the procedures of mediation: they seemed to listen with care to the form and content of what was said by the disputing parties, to use questions and summaries to clarify: areas of agreement and disagreement, and competently to marshall any pointers to mutually acceptable arrangementsor accommodations. Some displayed a particular gift for finding the right phrases to put parties at their ease and to keep interaction flowing in a constructive (though not necessarily peaceful) fashion)-4

(8) Despite the non-interventive and non-directive stance adopted, the mediators obviously worked hard for an agreement between the parties. While repeatedly stressing to the parties that the matter is in their own hands and that a solution can be obtained only through their own efforts,

> they tended strongly to encourage the parties to reach an agreement, frequently suggesting that it was in the interests of both to settle the matter in a mutually acceptable way'.[15]

(9) The most difficult part of the process was to get the disputing parties to talk to one another. Although the principals are willing to address the mediators about their concerns in the presence of the other party, they show marked reluctance to speak directly to each other. As we noted earlier, getting the parties to deal directly with one another is the primary objective of mediation.

It is interesting to note that a generally negative view is taken of settlements arrived at without going through the mediation process. It is common for parties to try to use the Centres - mainly through the full-time staff member whose task it is to co-ordinate the work by bringing the principals and mediators together - to arrange settlements over the telephone. This negotiating of agreements at arm's length is seen as doing nothing to improve communication between the disputing parties and as leaving them in no better position to deal with future matters of dispute.

Two further points might be noted. The usual practice is to have two mediators working together in the mediation session. The researchers were sufficiently impressed by the success achieved in the CJCs to recommend that the New South Wales Government should continue to fund the existing Centres and to extend the scheme either by expanding the reach of the present Centres or by establishing further Centres or Sub-Centres.

The South Australian Commissioner for Equal Opportunity

The Commissioner for Equal Opportunity in South Australia was charged with the implementation of the Sex Discrimination Act 1975 and the Handicapped Persons Equal Opportunity Act 1981,passed by the South Australian legislature. Similar Offices have been established under comparable legislation in New South Wales and Victoria (and, more recently, Western Australia). The legislation provides for matters of complaint to be investigated and resolved by conciliation in the first instance with referral being made to a tribunal, if conciliatory attempts fail to settle the matter.

Although the legislation and the powers of the statutory officers are broadly similar in the four states, there is scope for difference in emphasis in the steps which may be taken in the investigation and settlement of a complaint. The South Australian Commissioner for Equal Opportunity was heavily committed to achieving a resolution of complaints by conciliatory means and it was rare for a case to be brought before one of the Tribunals - the Sex Discrimination Tribunal or the Handicapped Persons Discrimination Tribunal. In a discussion of the approach adopted in that State the point was made that it was then more than six months since a case had gone before a tribunal.

In putting her case for her approach, the Commissioner, Mrs Josephine Tiddy, said that in her view the conciliation approach allowed for more weight being given to the substance of the complaint. Not all discrimination, on the grounds of sex, marital status and/or physical impairment, is made unlawful by the Sex Discrimination Act 1975 or the Handicapped Persons Equal Opportunity Act 1971, and in addition there are certain defined exemptions in both laws. This means that when a formal legal approach is taken, as happens when a case comes before a tribunal, there is scope for the respondent, with the aid of skilled legal representation, to find loopholes in the legislation which will allow him or her to win a case on a fine technical point even though the complainant's case is, in

terms of substance, a very strong one. Where the case is settled by conciliation, the outcome, while arrived at with due consideration of all the provisions of the legislation, is more likely to be in accordance with its spirit. For this . reason she preferred the less formal procedure of conciliation.

The Commissioner's Office has prepared two brochures which are made available for the guidance of potential complainants and respondents. respectively.[16],[17] These set out the role of the Commissioner under the two discrimination Acts, the matters these Acts cover, the procedures employed when a complaint is lodged and what is required of the complainant and respondent in the investigation and settlement of the complaint. Our interest is in the procedure adopted once a complaint is made.

The first step is to establish whether the complaint is covered by the legislation which makes unlawful

> discrimination on the basis of *sex*, marital status or physical impairment in areas of employment, education, provision of goods and services, accommodation and in advertisements' .18

Most complaints - approximately 98 per cent of those received - come through the telephone. A screening officer who handles all telephone enquiries initially determines whether the complaint falls within the ambit of the legislation. If there is any indication of discrimination on the grounds detailed by the Acts which the Commissioner administers, a personal interview is arranged with the legal officer, who records the details of the complaint, assists the complainant in making a written complaint, and informs the complainant of the procedure which will follow. The interview provides complainants with an opportunity to share their feelings of anger, frustration and hurt which almost always accompany complaints of discrimination and for the legal officer to prepare the complaint if there are any obvious jurisdictional issues or problems. The complaint is then allocated to a Conciliation Officer for investigation.

The respondent is advised in writing of the complaint and is interviewed by the Conciliation Officer. Witnesses may also be interviewed. Where necessary, the complainant will be interviewed for further details or clarification of issues raised in the course of the investigation. It is possible that in the course of the investigation the complaint may be settled (e.g. by the acceptance of an offer made by the respondent).

When the investigation has been completed and the Commissioner is in possession of the relevant information, she makes a decision as to whether to entertain or decline the complaint. If the complaint is declined, the complainant is notified of the reasons in writing. The complainant at that stage may ask that the Complaint be referred to the relevant Tribunal, which must hear it. The respondent is also notified in writing if the complaint is declined.

When the decision is to entertain the complaint, a conference is called. The complainant can choose whether or not to attend the conference. Ordinarily the complainant attends, but his/her presence is not considered essential, because he or she will already have made clear to the Commissioner the nature of the remedy or resolution that is sought.

For the respondent attendance at the conference is compulsory, but the Commissioner prefers to work on a co-operative basis with a minimum of coercion. As the brochure puts it,

> The Commissioner has the power to insist, subject to penalty, that you attend the Office to discuss the complaint, but prefers to work cooperatively with you in resolving the matter.-[9]

The persons present at the conference are restricted to the Commissioner, the complainant, the respondent and, where requested, legal representatives of the parties.

Proceedings in the conference are privileged in that nothing said or done in the course of the conference can be used in any subsequent action before the Tribunal should the case

proceed to that stage. Indeed, all proceedings in the Conference are confidential.

In discussing what happens at such conferences, the Commissioner said that there were two situations to consider:

(1) that in which, as a result of the investigations, she had arrived at a firm decision on the merits of the case and the appropriate redress to be provided for the complainant; and

(2) that in which she still had some doubts on the merits of the case and wanted to use the conference to clarify some issues before proposing terms of settlement.

A firm decision

In those cases in which she had arrived at a firm decision, she gave to both parties a written statement which set out:

(a) the allegations made by the complainant against the respondent;

(b) the information supplied by the respondent and others;

(c) the matters in dispute; and

(d) an account of where she believed the complaint fell in respect of the law.

In this situation, the allegations, the information supplied by the respondent and the matters in dispute are all discussed and some consensus is generally reached. Even if consensus is not reached, these areas are discussed and then the respondent is asked how he or she proposes to resolve the complaint. Respondents usually seek the Commissioner's views on a proposed settlement and she often suggests a settlement which includes both an individual remedy and a policy change designed to prevent further complaints of discrimination.

The proposals are open to negotiation and both complainants and respondents are aware that the suggestions are only ideas that can be accepted or rejected by one or both sides. But if it seems to the Commissioner that a proposal for settlement is

unreasonable then she advises the parties accordingly, leaving the decision to accept or reject the offer to the complainant and the respondent.

When the terms of settlement are agreed upon, the agreement is treated as a no-fault settlement. In the words of the brochure,

> It provides the opportunity to resolve a complaint without a judicial determination being made on the merits of the case.[20]

The agreement is treated as a contract between the complainant and the respondent. Should the latter subsequently fail to fulfil the terms of the agreement, action is taken by the complainant, who is generally assisted by the Commissioner, for breach of contract.

In order to settle the matter of the complaint the respondent may be required to

- make available the previously denied employment, goods or services, accommodation or education;
- provide compensation for any damage incurred because of the discrimination;
- correct previous discriminatory practices; or to
- take other corrective steps to eliminate the effects of discrimination.[21]

In case of doubt

In those cases in which there is still some doubt in her mind after her officers have made their investigations and she has examined their reports, the Commissioner calls a conference of the parties with a view to resolving the doubts and effecting a settlement. As in those cases in which she had reached a decision, she provides the parties with a statement. This also sets out the allegations of the complainant, the information supplied by the respondent and others and the matters in dispute. It does not include her assessment of where the matter falls in respect of the law. Such

conferences are devoted to clarifying issues in question and reaching a conclusion and settlement. Once a decision has been arrived at, the procedure is tp.e same as in the situations described above.

The conduct of the conferences

The Conferences are formal in that the Commissioner exercises firm control. The parties are allowed to express their feelings so long as these are not abusive. The Commissioner takes the opportunity, to use her words, 'to educate the respondent on his/her responsibilities under the legislation' .[22] This is not done in a hectoring manner, but rather in a way which conveys the assumption that the respondent is willing to Comply with the law once he or she understands what is required of him/her.

In respect of the statements provided for them, the parties are clearly informed that the document is not a legal document, but a means to facilitate conciliation and, as such, is confidential. In some instances complainants and respondents keep the document. Where the matter is not conciliated, the document cannot be taken from the room.

The aim of the conciliation process is to repair, so far as is possible, any loss or injury suffered by the complainant, to ensure against any recurrence of the discriminatory behaviour' on the part of the respondent and to achieve these objectives with a minimum of residual resentment and hostility in respect of the law and its implementation on the part of the respondent. While the legislation specifically interdicts any subsequent victimisation of the complainant by the respondent, it is hoped that the conciliatory tone in which the proceedings are conducted will enable the parties to put the past behind them.

The Commissioner for Community Relations

We have already discussed the conciliation procedure employed under the Commissioner for Community Relations, We will

consider here those aspects which are most relevant for comparison with the two approaches just described.

When a complaint is lodged in writing with the Commissioner, the first step is to check that it is a valid complaint under the Racial Discrimination Act 1975. The respondent is then notified and the complaint is inquired into. The complaint may be settled by appropriate reparative action on the party of the respondent at any stage during the inquiry. Should it be considered necessary by the conciliator, a compulsory conference may be called at which the parties are required to attend. Either party may bring a friend or advisor at the discretion of the conciliating officer. Legal representation is usually not allowed if it seems likely to impede progress towards a conciliated solution through the raising of technical legal issues. On the other hand, proceedings may be adjourned to allow one of the parties to seek legal advice, and the convenor of the conference may request the presence of a legal representative of one of the parties where this seems likely to promote the prospects of a settlement.

The proceedings in the conciliation conference are relatively unstructured. The officer convening the conference formally declares the conference open and outlines the procedure which, will be followed. From that point the discussion becomes open and anyone present may participate. Order is maintained,by the convenor who will usually allow free expression of feelings where the speaker is 'owning' his feelings, but not where they take the form of abuse of the opposing party. That is, a person will be free to state feelings of hurt, anger, humiliation, and the like in respect of the events he or she has experienced, but that person will not be allowed to direct a stream of invective and abuse at anyone present.

In such conferences the early phases are characterised by a statement of positions on both sides and of justifications of stances taken. These stages are likely to be marked by emotional outbursts - usually on the part of respondents. As the conference proceeds the discussion turns towards the terms

of settlement. When agreement is reached, the conference closes on a verbal understanding without any documents being signed. Should there be failure **to** reach an agreement, the complainant may request that a Certificate be issued to enable the Case to be taken to court in a civil action for damages under the Act. In no instance has such A request been refused. When this stage has been reached, the Commissioner has come to the limit of his powers and nO longer has a pert in the case.

The three approaches - comparisons

It will be apparent that there are some differences in the emphasis in the three approaches. The Community Justice Centres, with their emphasis on the autonomy of the principals and the voluntary nature of their attendance at the conferences, belong towards the mediation end of the scale. The Commissioner for Equal Opportunity and the Commissioner for Community Relations, as officials charged with the task of administering legislation which makes certain acts unlawful, have more active roles and greater responsibilities in the organisation and conduct of the negotiations between the parties.

All three approaches have features in common. They all seek to settle the matter of the complaint through a co-operative and low key process of negotiation with a minimum of recourse to the formal, impersonal and adversarial machinery of court action. They all seek an outcome that is perceived to be fair in terms of the commonly accepted standards of the community. They all seek to resolve the matter with a minimal residue of bitterness and resentment both between the principals and between either principal and the conciliating agent or the legislation. In all cases the emphasis is on the promotion of communication and understanding rather than on the assignment of guilt and blame.

The differences between the approaches arise from differences in the contexts in which the intervention occurs and

until 1982, when an Aboriginal woman was so blatantly discriminated against in housing that her family became involved and a series of compulsory conferences were called, that enough enthusiasm was generated to call meetings for the purpose. The first meeting was held at the TAFE College on 31 August. Films were shown and a discussion on community relations followed. Equal numbers of Aboriginals and non-Aboriginals had been invited and had attended. After a few more meetings the Committee was formally established.

While about forty people attended the first meeting the current membership is between twelve and fifteen. Anyone who subscribes to the objectives of the Committee is welcome to join. The work undertaken has been mainly concerned with problems of accommodation and the promotion of understanding of community issues. Community response has been favourable and Mrs Sarra has written that she looks forward with confidence to the future though she would like to see more active involvement of the Aboriginal people.

The Committee has taken the view that, while it wants the support of the Commissioner and his staff, it is important that it should, as far as possible, try to resolve local matters of complaint and dispute without invoking outside assistance. In this way it would develop its own resources and create a strong local community spirit. This desire to retain the initiative locally in dealing with grievances and disputes has been recognised and welcomed by the Commissioner. To further the objective of cultivating local resources, the Commissioner, under the amended legislation, empowered Mrs Sarra to preside over a compulsory conference which

> dealt with a complaint that a 16 year old girl who had been offered a job with a Bundaberg caterer was subsequently refused the job because of the colour of her skin. 'k

The outcome of the conference was a personal and public apology being made to the girl by the caterer and a further offer of employment. The Commissioner for Community Relations, Mr Jeremy Long (who had succeeded Mr A.J. Grassby as Commissioner in November 1982) attended the conference. Commenting afterwards on the significance of the event, he noted that Mrs Sarra had worked informally with the Office over six years during which she had attended many such conferences. He was quoted:

> With the emphasis on conciliation in matters of racial discrimination, it seems sensible to have local communities dealing with their own problems.
>
> This is the kind of development we would like to see where more people are trained and developed to operate under the Racial Discrimination Act to settle matters of discrimination.[5]

The power granted to Mrs Sarra applied only to one particular conference, but, as Mr Long pointed out, similar formal powers could be granted to her on similar future occasions. There is obviously great scope for further extension of such powers to other suitably experienced and capable people in other centres.

As these accounts suggest, the Consultative Committees provide a link not only between the Commissioner and the local communities, but also between the settlement of complaints and community education and change. They are, in effect, agencies of community development in the area of race relations. They deal with the everyday concrete events that constitute the fabric of social interaction, but they deal with them not as isolated and independent occurrences but rather as part of a larger whole. Their focus is the context in which the events arise and which gives pattern and meaning to those events.

Without the specific complaint, attempts at reaching and influencing the community would be in danger of becoming the mouthing of pious generalisations and abstract platitudes to which everyone could give lip service while continuing with their old exploitative activities. On the other hand, without an education program aimed at changing the behaviour and

differences in the objectives which are sought. We can consider some of these differences.

In the case of the Community Justice Centres, the focus is on the relationship between the parties rather than on the matter in dispute. The goal is to help the parties to improve their ability to communicate in a constructive way with each other, rather than to solve some problem which has developed between them. That is, the aim is not to solve problems, but to cultivate problem-solving ability. Only parties who have some form of continuing relationship are regarded as appropriate 'clients' for the centres and intervention is deemed to have been successful if the parties leave with a better basis for conducting their negotiations in the future even if particular issues in dispute remain unresolved. This use of the term 'client' deserves to be noted. The Community Justice Centres see their role as one of providing a service for the disputants not unlike that which a psychotherapist and marriage counsellor might provide for persons seeking such professional help.

The position of the Commissioner for Equal Opportunity is quite different. For her the primary concern is not the future of the relationship which may, in fact, have terminated, but the just and equitable settlement of a specific complaint or claim by one party against another. While it might be possible to call the complainant a client of the Commissioner, the term could hardly be used in respect of the respondent. The impartiality of the Commissioner extends only as far as the investigation into the complaint is concerned. Once it is established that an offence has been committed by the respondent - and this point is usually reached before the conference takes place - the Commissioner has the task of exacting appropriate redress on behalf of the complainant and ensuring that the respondent does not repeat the offence.

The position of the Commissioner for Community Relations approximates that of the Commissioner for Equal Opportunity

with some qualifications, ,Like her, his impartiality relates:: to the inquiry into the complaint. Once it has been established that the complaint is a valid complaint under the Racial Discrimination Act, his task is to assist the parties . to arrive at a mutually acceptable settlement. However, the relationship aspects are also salient in his approach.

Because It is rare for a non-Aboriginal to give an attentive hearing to an Aboriginal, or to speak with one on a persontp7person basis, the conciliation conference offers an opportunity for some bridging of the gap at an interpersonal level and insofar as each party represents a community, group, also at an intercommunity level. It seems to be the case that Aboriginals who have participated in compulsory conferences with people who have discriminated against them — hotel proprietors, estate agents, police -7- gain so much in confidence fro m the experience that they are often able: subsequently to negotiate on a firm but conciliatory basis with subsequent offenders. So while there may not be a continuing relationship between the particular individuals involved In any given Case, there is a continuing relationship between the Aboriginal and non-Aboriginal communities which is of central concern for the Commissioner and his staff. It will be seen that in the commitment to the promotion of communication and dialogue between the parties, there is much common ground between the Community Relations approach and that of the Community Justice Centres.

It is important to note the different geographical contexts in which the different approaches are employed. The Community Justice Centres and the Commissioner for Equal Opportunity conduct their activities in large urban settings while conciliation conducted under the Racial Discrimination Act in which one of the principals is an Aboriginal usually occurs in comparatively small rural centres. In the amorphous social structure of the large city where a certain degree of anonymity tends to prevail, each case coming into the Justice Centres or before the Commissioner for Equal Opportunity is separate and distinct from every other case. The cases cannot be linked in such a way as to have a combined impact on the

communities in which they occur. The situation is quite different in the smaller provincial centres where cumulative and combined impacts can be achieved. Thus, when in one centre, five compulsory conferences involving discrimination against Aboriginals in housing were held in one week - two in respect of estate agents and three in respect of landlords - there was quite a profound impact on the community. The local Aboriginal people were stimulated into greater activity in asserting their rights and the local non-Aboriginal people became more appreciative of their obligations, while the media in the area had a field day. As has been pointed out elsewhere in this report, the establishment of Consultative Committees on Community Relations and the involving of members of such Committees in conciliation enables the incorporation of the compulsory conferences into a more comprehensive program of community development and change in a way that would not be possible in a large metropolis.

The conclusion we can draw from our consideration of the three patterns of conciliation is that they constitute successful adaptation to the demands of the situations in which they are employed and the purposes for which they have been established.

CHAPTER 11 ENDNOTES

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14. ibid., p.44.
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16. Commissioner for Equal Opportunity (South Australia), *A guide for complainants,* Adelaide, 1982.
17. Commissioner for Equal Opportunity (South Australia), A *guide for respondents,* Adelaide, 1982.
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CHAPTER 12. THE SOCIAL CLIMATE AND THE NATURE OF THE TASK

The strategy adopted by the conciliation staff of the Office: of the Commissioner for Community Relations and, after 1981, by officers of the Human Rights Commission working with the Commissioner for Community Relations, has been to Work with and assist in the development of the resources of those elements in the community which are trying to achieve more equitable and more harmonious community relations. In this endeavour the first and most basic task is to provide avenues for complainants to obtain remedies under the Racial Discrimination Act for unlawful acts of racial discrimination against them. This point cannot be overstressed even though the broader and longer term aim is community development through the processes employed in investigating and resolving the matters of the complaints

The approach has two aspects. On the one side there is the attempt to help the Aboriginal people to make effective use of the Racial Discrimination Act to achieve substantive gains in such areas as housing, employment, equitable treatment by police and access to goods and services and, in the process, to gain experience, confidence and skill in negotiating with those who control access to such resources. Parallel with this is an attempt to promote, through a process of education sometimes involving confrontation and compulsory conferences, an understanding and acceptance on the part of the members of the dominant non-Aboriginal society of the aspirations and expectations of the Aboriginal people.

Parallel attempts are being made in other countries - particularly among the Western democracies - around the globe. Underlying such attempts are two sets of goals between which a potential incompatibility gives rise to a continuing tension. The first is the achievement of substantive gains. By this is meant the acquiring of a more equitable share of scarce or limited resources such as land, income, political power,

educational opportunity and the like by the less privileged or more deprived section of the society. The second set of goals is concerned with the achieving of improved intercommunity relations which ensure peaceful and co-operative intergroup and interpersonal relations.

Unfortunately the attempt to achieve substantive gains usually arouses the resistance and hostility of the members of the more privileged section of society which sees such changes as involving losses for themselves. The resulting confrontation between those seeking social reform and those resisting it all too often leads to violence which threatens the fabric of the society.

Since the dual goals of substantive gains for the less privileged sections of our society and the achievement of more harmonious intercommunity relationships were explicit both in the intentions of the legislators and in the policy adopted in the implementation of the legislation, the question of how they have been pursued in practice is a matter of critical interest. Before trying to deal with this specific case, however, it may be useful to review at a general level the tactical problems posed by the underlying incompatibility of the two sets of goals.

Contrasting change strategies

Walton in a short, but important, paper has discussed the dilemmas that are posed. He was interested in the sort of advice that behavioural scientists might give to such persons as leaders of human rights movements which aim at the dual goals of substantive gains and improved relationships.[1]

He points out that those behavioural scientists who have devoted themselves to the study of processes of social change divide into two distinct groups. On the one hand there are the 'power strategists' who are to be found among game theorists, students of revolution and diplomatic strategists. They focus on building a power base and the manipulation for their ends of the power it provides. On the other hand, there

are those he calls 'attitude change strategists' who are found in the ranks of social scientists concerned with human relations studies which may range from the theory and practice of counselling to management consultancy in industry. The power strategists either ignore completely, or depreciate the contributions of, the attitude change strategists who, for their part, reciprocate in kind.

As Walton argues, it may be quite reasonable for the theorists to pursue narrowly the implications of their specialised strategies in the quiet seclusion of their academic retreats, but the 'real' world is complex and the practitioner in the field must grapple with situations which call for mixed strategies in the attempt to achieve substantive gains and at the same time preserve relationships. The question he asks is how one can combine the power strategy, which seems to be most effective in achieving substantive gains, with the attitude change strategy which seems necessary for the cultivation of good relationships.

He is quick to point out that the combination of the two strategies is no easy task. In every aspect of interaction, the power strategy, with its emphasis on the mobilisation and manipulation of power, requires tactical operations which are diametrically opposite to those required by the attitude change strategy with its reliance on 'overtures of love and trust and gestures of goodwill, all intended to result in attitude change and concomitant behaviour change'.[2]

He lists seven dilemmas which confront the person who would try to integrate the two strategies in a practical situation. Examples of these dilemmas are as follows:

> In the power strategy it is tactical to overstate goals in the attempt to improve one's bargaining position while in the attitude change strategy it is tactical to minimise differences and emphasise common ground. The respective disadvantages of the two sets of tactics are that in the former there is a danger of convincing the other party that the differences run much deeper than had

> been thought, or than are in fact the case, and hence that attempts to negotiate a settlement are a waste of time, while in the latter the other party can press for Concessions since one has little at stake.
>
> In the power strategy it is tactical to deride the other, to focus on his faults, impugn his motives, question his rationality and challenge his competence. Such activities help to build one's own confidence and to minimise the sense of loss through alienation of the other. In the attitude change strategy, in contrast, it is tactical to emphasise the other's good qualities and to enhance his feelings of worth and competence.
>
> In the power strategy it is tactical to stress one's own independence and lack of need of the other and the other's dependence on and need for oneself. In the attitude change strategy it is tactical to stress one's need of, and dependence on, the other.[3]

Similarly, conflicting tactics arise from the two strategies in the area of information giving, where ambiguity and uncertainty contrast with openness and predictability; in respect of threat, where maximising threat contrasts with gestures of conciliation and goodwill; in hostility management, where a directing of hostility against the other party contrasts with a working through of the hostile feelings; and in coalition formation, where exclusion of the other from coalition groups contrasts with inclusion of the other in groups sharing common interests.

Managing the dilemmas

Given that it is desired to combine the two strategies, the question arises as to how these dilemmas can be resolved or at least handled so as to minimise the negative consequences and maximise the positive effects. Walton suggests that there are ways in which this can be achieved.

Perhaps the most common method is to use the two strategies in sequence moving from one to the other as appropriate.

Provided that the changes from one strategy to the other are not repeated at short intervals, and that there are acceptable explanations for the occurrence of the switches, their use may be credible. Thus a country may go to war with another when its sovereignty is threatened, but become conciliatory and ready to negotiate over disputed issues when its adversary withdraws or concedes defeat. In race relations a particular campaign may involve a street demonstration phase with).0tentially violent confrontation and a subsequent negotiation phase.

Typically such switching or alternation of strategies begins with a power phase in an attempt to gain a position of some strength followed by an attitude change phase. The power play may be necessary in order to force the other party to take matters seriously and engage in a genuine attempt to resolve the issues in dispute.

A second way to combine the two strategies is possible where the contending parties have multiple membership. In such cases power strategies may be implemented by some sub-groups while other sub-groups employ an attitude change strategy. So, in the case of two nations, a power strategy may be employed at the level of diplomatic representation while an attitude change strategy is being employed by cultural groups or sporting bodies. In race relations it is possible for some sub-groups to implement a power strategy while other sub-groups of the same race employ a more conciliatory attitude change approach.

A third approach consists in trying to maximise the impact of the power strategy while minimising its alienating effects. Whatever strategies are employed, there is usually some choice in the detailed aspects of their implementation. The particular form the implementation takes may have considerable significance in terms of the effects on the other party. Thus in implementing a power strategy it is possible to behave in a

way that is insulting and humiliating for the other party or in a way that preserves that party's self-respect. Usually insult and humiliation adds little to the desired impact and is quite destructive of the relationship, whereas the other approach allows the preservation of at least overtly courteous relationships in which negotiations can be carried on. To call someone a racist or a male chauvinist may do something to relieve the feelings of the speaker, but its most likely effect on the person addressed would be to antagonise that person and in all probability make him or her more determined and a more difficult person with whom to negotiate. The Romans who were an extremely practical people with a flair for administration had a motto which covered this point - *'graviter in re, suavitar in mode'.*

In making the foregoing points Walton notes that the extent to which the power and attitude change strategies are mutually disadvantageous depends to a considerable extent on whether one takes a short-term or a long-range perspective. From a short-term viewpoint the use of the power strategy entails a deterioration in the relationship, but from a longer range perspective the converse may well apply.

After they have recovered from the initial shock, people who have been forced to make concessions to others whom they have previously ignored or patronised often come to regard the latter with more respect and acceptance. In this regard it is of interest to note that in studies of cognitive dissonance it has been shown that internal attitudes and beliefs tend to change so as to conform to external behaviour. So if one racial or ethnic group can force another racial or ethnic group to change its overt behaviour in the direction of treating their members in a more equal and fair way, then the group's attitudes and beliefs are likely to change in the same direction. And indeed it is only when equal status and power have been achieved that stable and healthy intergroup relationships are possible. As long as one group remains at a power disadvantage the relationship between its members and those of the more powerful group will be clouded.

The use of the power strategy by the disadvantaged party

In this summary of Walton's discussion, the situation has been presented from the perspective of the party (whether a group or an individual) seeking change in the relationship. This will be the party which is suffering deprivation or oppression, though it may enjoy some support from a section within the more dominant party. As Walton makes clear, wherever a group is at a power disadvantage and perceives a potential for achieving equality, it will employ a preponderance of power tactics in its strategic mixture. It will use tactics which have the aim of causing hurt, loss, injury or inconvenience to its more powerful opponent. In the sphere of inter-community relations, the tactics employed may range from violent rioting to relatively passive forms of civil disobedience all designed to disrupt the ongoing activities of the larger society and to prevent the more privileged from enjoying the fruits of their relative position. Power is the ability to determine such matters as whether others will get something which they valued or whether they will undergo some noxious experience which they would preferably avoid. It may consist of being able to confer something as a gift, to deny something by a process of obstruction or disruption, or to inflict some injury by a hostile act. It may seem somewhat paradoxical that a party to a relationship is most likely to revert to a power strategy when it is in a relatively weak position. This probably occurs only when the party perceives that it is in a position where it has comparatively little to lose and there is some possibility of achieving a change in the power balance.

The act and the power balance

It is in this context that the contribution of the Racial Discrimination Act must be considered. Essentially it provided the Aboriginal person, at a time when that person was beginning to assert a right to a better deal, with a legal basis on which to take a stand. Until its advent, whenever an Aboriginal experienced discrimination in respect of housing,

of failure to receive service, of unemployment or of harassment by the police or other officials, there was no legal basis on which that person could seek redress. Typically the choice seemed to be between submitting meekly to the injustice done, or venting frustration in some form of violent expression either in words or in action. It is hardly surprising that, in the face of continued and repeated frustrating experiences sometimes involving a major deprivation or injury and sometimes a minor pin-pricking insult, but accumulating over time, there would be periodic outbursts of violence often triggered off by an apparently trivial incident. The difference made by the Act, in those localities where it has been firmly applied, was that for the first time the Aboriginal people had a formal legal basis on which to take a stand and demand consideration of their grievances. In outlawing discrimination the Act served notice that members of racial minorities were no longer fair game for exploitation by people in the more established and powerful sections of society. It gave legal and moral force to the somewhat vague but broadly accepted concept of the equality of individuals. It was no longer possible to brush off and ignore the complaints of the victims. These had to be faced and resolved in a context where the discriminator negotiated directly with the person against whom the discrimination had been made.

This personal confrontation between discriminator and victim deserves attention. Given that the discriminator has assumed superiority because of racial origin, it is a significant and chastening educational experience for him or her to sit down as an equal with, listen to and respond to his or her victim and, in all probability, acknowledge guilt and offer redress even if this is of a limited nature. This important interaction at a direct personal level which defines experientially the equality of the participants would be lacking in the more impersonal and detached atmosphere of a court where transactions are conducted largely through legal representatives. The fact that the experience for the respondents is a highly emotional one is attested by the angry

outbursts displayed both when directed to attend a compulsory conference and in the course of the conference.

For the complainant also the direct encounter with the respondent is usually a significant educational experience. The average Aboriginal does not often have the experience of being listened to attentively by a white person and particularly by the sort of white person who would discriminate against him or her. Consequently it is a matter of some moment for Aboriginal people to discover that they can command a respectful hearing and *engage* in a person-to-person discussion on an equal, or indeed morally superior, footing with people who may be influential figures in the local community. To have such people apologise and undertake not to repeat the offensive act, can significantly enhance the self-esteem of Aboriginal people and create a new perspective on their place in the wider society.

Thus when the conciliatory negotiations are conducted in a serious and orderly manner and the integrity of the parties is respected, there is a potential for change toward equality both in external observances and in internal perceptions on the part of both parties. The possibility of growth in understanding and mutual respect is enlarged.

On conciliation

The Racial Discrimination Act provides a basis for the initiation of change in community relations. By giving some power to the disadvantaged party in racial disputes it reduces the need for that party to engage in tactical applications of the power strategy which have potential for the destruction of relationships between it and its entrenched opponents. But its effective application, so that it has some real impact without seriously impairing community relations, calls for skill in conciliation and negotiation. It might well prove counter-productive if it were implemented in such an abrasive way that the respondents and their sympathisers were to mobilise their resources to amend it or reduce its impact. Thus it is important that it be implemented in a way that

gains the respect and acceptance even of those respondents whose behaviour it constrains.

Currently there is a growing interest in conciliation processes as the more developed countries increasingly pass legislation to ensure as far as possible equal opportunities for all irrespective of differences in race, religion, ethnic affiliation, sex, age and physical impairment, and rely, in their legislative provisions, very heavily on conciliation as the means whereby it should be implemented. Indeed there seems to be a pronounced trend, throughout at least the technologically advanced nations, to rely on negotiation and conciliation rather than on coercion for the management of human interaction at all levels from the internal operations of families to the resolution of international disagreements. It is hardly surprising therefore that social scientists are taking an interest in conciliation and negotiation processes and endeavouring to spell out the principles governing success in them.

In a sense Walton was concerned with the problem of negotiation. In conciliation and negotiation for a mutually satisfactory outcome we do not eliminate the power element. Its manifestations, however, tend to be muted. Fisher and Ury, in their work in the Harvard Negotiation Project, deal with the same general problem that exercised Walton, but their approach and emphasis is sharply different.[4]

In his paper Walton acknowledged that in human interaction where there was contention over the distribution of scarce resources two forms of outcome were possible. In the first case the resource at issue is limited in quantity and does not allow of enlargement as, for example, a given piece of land. If the parties are contending over the amount of that piece of land which each is to have, then it is clear that the more one has the less the other will have. Any gains by the one must be matched by a corresponding loss by the other. Negotiations of this type are called 'zero sum games' in that the sum of the gains and losses - that is the net gain - is zero.

In the second type of situation the goods or resources at issue are not necessarily fixed in magnitude. In the above case, if what is at issue is the product of the land - what the land can produce in terms of food, textiles, timber, recreation or whatever - then clearly this may be increased by co-operative effort which makes the most use of the knowledge . and skills of the contending parties. By co-ordinating their efforts and increasing the output both may stand to gain as an outcome of their negotiation. This would be a 'non-zero sum game' in that the net gain Would exceed zero.

The point at issue is expressed in the homely metaphor, often invoked in management - labour negotiations, of whether the parties should be considering how to divide up a given cake or how to go about baking a bigger cake so that all might get a bigger slice.

Walton's position on this matter is that the situations in which he is interested, where oppressed minority groups are seeking changes that would give them a more equitable share of scarce resources including such intangibles as social status and recognition, allow only of zero sum type games or negotiations. Fisher and Ury, on the other hand, tend to see much greater scope for non-zero sum games in negotiations covering a very wide range of issues which at first sight may seem to conform to the zero sum formula. While they do not deal explicitly with those situations in which Walton is interested,they imply that their principles would hold for all areas of negotiation.

The pivotal point of their argument is a distinction they draw between interests and positions. In negotiations people are primarily concerned with having their interests met, but they usually go about achieving this by taking positions. Once positions are taken, a zero sum game ensues. To convert the exercise into a non-zero sum game it is necessary to transcend positions and get back to the interests at issue.

An example cited by Fisher and Ury is the accord arrived at in the Camp David negotiations between Egypt and Israel. On

arrival, Egypt had taken the position that the whole of the Sinai had to be returned. The interests behind this position were matters of national pride. The Sinai had been Egyptian territory dating back to the Pharaohs. After domination throUgh the centuries by successive invaders - Greeks, Romans, Turks, French and British - Egypt had only recently regained full sovereignty over its territory and was not prepared to cede an inch of ground to another foreign conqueror. Israel, on the other hand, had taken the position that it must retain a corridor along its frontier as a protective buffer against sudden attack by Egyptian armour.

The two positions were incompatible. As long as they prevailed the negotiations had the form of a zero sum game. The solution lay in concentrating on the interests. Egypt's national pride was respected by granting her sovereignty over the whole of the Sinai, while Israel's concern with security was met by having large zones fronting its border demilitarised.

If we want an example closer to the subject matter of this report, the resolution of the dispute described in Chapter 7 between the hotel management and the Aboriginal who was refused service was arrived at by focusing on interests rather than positions.

When people take positions the problem arises of choosing between the power and attitude change strategies with the dilemmas they pose in the conflicting tactical operations. Fisher and Ury use the term 'hard positional bargaining' for Walton's power strategy and 'soft positional bargaining' for his attitude change strategy. In hard positional bargaining the goal is victory. Substantive gains are what matter and if in the process enemies are made that has to be accepted as a necessary cost. For the soft positional bargainer, on the other hand, it is the relationship that is important and, if substantive concessions have to be made to maintain the relationship, the losses incurred are considered to be

justified. In the extreme case the soft positional bargainer seeks peace and good relations at all costs.

Soft positional bargaining tends to occur in families or among friends where the parties may compete in being generous and considerate of each other's needs. Fisher and Ury consider that, even here, soft positional bargaining with its preoccupation with the relationship is likely to produce sloppy agreements. Hard bargainers on the other hand are likely to fail to reach agreement and may well find themselves in an escalating situation of mutual damage or loss. When the negotiation is between a hard positional bargainer and a soft positional bargainer, the former will invariably make substantive gains at the expense of the latter who in colloquial parlance 'will lose his shirt'.

The difference between positional bargaining and negotiation based on the consideration of interests is radical. In the former situation the participants face each other either as adversaries or friends depending upon whether a hard or soft bargaining stance is taken. In the latter case, the participants do not confront each other but rather, metaphorically speaking, sit side by side confronting the problem of how the interests of both can be met simultaneously. In the discussion on conflict resolution in Chapter 2, the Houston study bringing police and community together was an attempt to achieve such a relationship.

The move from a positional bargaining stance to negotiating in terms of interests is a major step which is not easily taken by the participants, once they have become caught up in positional bargaining. Normally the intervention of a third party is required to enable the transition to take place. The reasons for this are:

> It is difficult for either party to take the initiative in proposing such a change. To be seen to be seeking to change the grounds of the negotiation is likely to be regarded as an admission of weakness in one's own position.

> Any such initiative is likely to be resisted by the other party. To allow someone to change the rules under which a negotiation is taking place is to accord him a position of power. The person who can make or change the rules of a game is obviously in a very strong position to control its outcome.

The difficulties which interacting parties - whether they are spouses, management and unions or nations in conflict - have in changing the nature of their interaction are notorious. Any move by either party is typically seen by the other as simply one more tactical manoeuvre within the prevailing frame or context of their relationship.

The entry of an impartial third party who is recognised as such by both participants opens the way for change. Such a party comes in at a higher level in the relational hierarchy. This confers an authority which allows him or her to define the terms under which his or her participation occurs and hence under which the further negotiations will take place.

Conciliation and its alternatives

As Fisher and Ury indicate, a consideration of major importance for the parties in determining whether they will settle the dispute through negotiation is whether they can achieve an outcome by other means that will better meet their interest. The alternative to a conciliated settlement for the complainant is to pursue the matter through a civil action in a court of competent jurisdiction. Before this can be done the complainant must receive from the Commissioner for Community Relations a certificate stating that an attempt has been made without success to settle the matter by conciliation.

As has been noted earlier in this review, the great majority of complaints are settled by conciliatory processes either with or without the necessity of a compulsory conference. . Nevertheless up to 30 June 1984, conciliation had failed and certificates been issued in respect of fifteen matters,

involving a total of thirty complainants; the fact that only two of these cases have thus far proceeded to resolution in court suggests that this is not, in present circumstances, a practical alternative. To the extent that this is the case the negotiating power of the complainant is reduced.

CHAPTER 12 ENDNOTEE

1. R.E. Walton, 'Two strategies of social change and their dilemmas', (1965) 1,1 *Journal of Applied Behavioural Science,* 167-179.

2. ibid., 168.

3. ibid.

4. R. Fisher & W. Ury, *Getting to yes: negotiating agreement without giving in,* Houghton Mifflin, New York, 1981.

CHAPTER 13. THE NEW ZEALAND EXPERIENCE

In developing an approach to the implementation of the Racial Discrimination Act, the Commissioner for Community Relations and his colleagues could have looked abroad for guidelines. New Zealand had passed comparable legislation some three and a half years earlier and this had *been* preceded by a similar act in England. The United States and Canada also had been active in the field of legislation against racial discrimination. There was thus some overseas experience by English-speaking societies with similar values and political systems which might have been drawn upon.

Little recourse was had to such possibilities. It was recognised that the history of intercommunity relations in Australia had its own distinctive features and it was considered that the most effective approach would be to concentrate on the needs of the Aboriginal people as these presented themselves and to endeavour to find solutions which met those needs. Moreover, the provisions of the Act and the powers it conferred set constraints on what could in practice be done. The result was that little attention was given to the way anti-discrimination legislation was being implemented in other parts of the world. Faced with the task of getting the work done and of making what contribution they could to community relations, the Commissioner and his staff made their own analysis of the situation and within the constraints imposed and the resources available set to work to do what they could.

This pragmatic course enabled them to get on with the task and opened the possibility of developing a distinctively Australian approach to the resolution of problems in inter-community relations. It also relieved them of the need to decide which, if any, of the overseas situations had relevance for the Australian context. In this review, however, we can take the opportunity to consider some

similarities and differences between the Australian scene and those of other English-speaking countries with racial minorities.

The Victorian Commissioner for Equal Opportunity, Mrs Fay Manes, after a visit to North America during which she studied the way in which legislation serving the cause of human rights was enforced in the United States and Canada, expressed the view that the position of the Aboriginai people was more analogous to that of the North American Indians than to that of the American blacks It Can be argued that there are important differences between indigenous people's such as the North American Indians, the New Zealand Maori and the Australian Aboriginals on the one hand and transplanted groups such as the North American blacks and the coloured communities in Britain on the Other. Indigenous peoples tend to retain associations with particular land areas or territories and hence to be substantially based in rural areas, whereas transplanted groups lack close ties with the land, usually do not own or have claims on substantial areas of land and tend to congregate in urban areas. Indigenous peoples tend to retain their language and traditions whereas transplanted groups tend to adopt the social patterns and language of the dominant culture. Indigenous groups tend to accord more influence and authority to their elders than do transplanted groups and are more likely to retain the values and aspirations of the older generation.

As an indigenous people the Australian Aboriginals would be expected to have more in common with the North American Indians and the New Zealand Maoris than with the other two groups. While there are very wide differences between these three groups both in terms of their economic development and social-political structure prior to contact with the Europeans, and in terms of the subsequent vicissitudes of their relations with the white intruders, any material which makes possible a comparison of the operation of anti-racist legislation in respect of these groups deserves attention. Since historically and geographically the New Zealand scene

approximates more closely to the Australian than do the North American situations, we can look briefly at the New Zealand experience.

We are indebted to Trlin for an account of 'The New Zealand Race Relations Act: conciliators, conciliation and complaints 1972-1981' which provides us with a survey of the legislative provisions and the experience of those charged with their implementation.[1]

As in the Australian legislation, the emphasis in the New Zealand Act, which was passed in December 1971 and came into force on 1 April 1972, was on conciliation, the officer charged with putting the Act into operation having the title of Race Relations Conciliator. The discriminatory practices outlawed by the New Zealand Act covered essentially the same grounds as those made unlawful by the Australian Act with the addition that there was provision for criminal prosecution in the case of refusal of access to public places, vehicles and facilities.[2] The New Zealand Act also provided for criminal prosecution for incitement to racial disharmony:

> any person who publishes or distributes written matter or who broadcasts or speaks publicly in a threatening, abusive or insulting manner with intent to incite hostility or ill will against, or bring into contempt or ridicule, any group of persons in New Zealand on the grounds of their colour, race or ethnic or national origin is liable to prosecution.[3]

The Australian Act made no provisions for the criminal prosecutions of acts of discrimination and did not make the incitement of racial disharmony unlawful.[4]

The New Zealand Act also gave greater powers to the Race Relations Conciliator in the investigation of apparent cases of discrimination and in the action he might take in dealing with them. It empowered him to

> require that relevant documents be produced and [to] ... examine (on oath) any person who can provide necessary information. If a settlement could not be reached, or an action contravened an earlier assurance regarding discriminatory acts, the Conciliator could recommend to

> the Attorney-General that proceedings be taken against the offender.[5]

Since the passage of the New Zealand Human Rights Commission Act 1977, the Conciliator's recommendation passes through the Commission to the Equal Opportunity Tribunal (see below).

Such provision contrasts with the Australian situation where, in the event that the Commissioner is unable to effect a conciliated settlement, the onus of taking the matter further through a civil action in the court rests entirely with the complainant.

As a result of experience in the operation of the Act some changes were later introduced. One of the most important of these related to matters covered by s.25. In the original legislation, offences under s.25 lay outside the jurisdiction of the Conciliator. Nevertheless, the Conciliator assumed a semi-formal mediating role even though he lacked the full backing of the Act for doing so. In order to remedy this defect s.9A was introduced. This new section differs in two important ways from s.25 which remains in the Act:

> (a) the element of "intent" (which had to be demonstrated to bring a successful action under section 25) has been removed so that it is now sufficient to prove that hostility or has been excited or that a group has been brought into contempt or ridicule: and
>
> (b) the criminal nature of any offence is absent. Complaints of inciting racial disharmony may now be investigated by the Conciliator under section 9A.[6]

A second change occurred consequent upon a provision in the New Zealand Human Rights Commission Act 1977 for civil proceedings before the Equal Opportunities Tribunal at the suit of the Commission. As a Commission member, the Conciliator is now in a position to press for the consideration of cases which he considers should be referred to the Tribunal. There is in addition a Proceedings Commissioner who refers cases relating to race, sex or religion to the Tribunal.

When the Human Rights Commission Act 1977 came into force on 1 September 1978, the powers and functions of the Conciliator vested in the Commission, but continued to be exercised by the Conciliator and his staff. The main change in practice was that the Conciliator's Annual Report which had been presented directly to the Minister for Justice became, after 31 March 1979, no more than a clearly identified component of the Commission's Annual Report.

Like the Commissioner for Community Relations in Australia, the New Zealand Conciliator encountered problems in staffing his office. Sir Guy Powles, who already held the position of Ombudsman, was appointed Race Relations Conciliator in December 1971 for a term of three years. A man of considerable standing with a background of legal and diplomatic experience, he was well qualified for the position. He resigned, however, within 18 months because his request for assistance was ignored. He sought a full time Deputy Ombudsman and a full time Deputy Conciliator, but was given a part-time Deputy Conciliator who was to devote one day a week to race relations work.

The vacancy created by Powles' resignation remained unfilled for two years. Trlin tells us:

> during this interval the Race Relations Office was headed by the part-time Deputy Conciliator, K.H. Mason who, in 1970, became the first Maori to be appointed a Magistrate. A busy magistrate, Mason acknowledged that his role in the day-to-day running of the office was 'a fairly minor one'. (RRC, 1974:13) The administrative functions were carried out by the Executive Officer, P.R. Sharples, who also investigated (at least in the initial stages) almost all complaints received until another investigating officer (E. Twist) was appointed and took up his duties on 1 July 1974 - fourteen months after Sir Guy's departure.[7]

The second Race Relations Conciliator, in the person of J.D.B. Dansey, was appointed and took up duties on 4 June, 1975. He was a Maori who

> had specialised in writing about Maori history, customs and contemporary life as a freelance journalist, author and playwright.

Appointed initially for a three year period, he held the position until his death in 1979. He became very committed to the responsibilites of his office and divested himself of other commitments to various organisation, including membership of the Auckland City Council, in order to avoid any conflict of interests and to give his full attention to the work.

Dansey was succeeded by Edward Te Rangihiwinnui Tauroa. The son of a Methodist Minister, Tauroa became a school teacher and was successively principal of Wesley College and Tuakau College. He was probably best known as a successful rugby coach. Initially in some doubt as to whether to take the position of principal of Whangaroa College or accept the post of Conciliator, he later expressed the view that the more he saw of the activities in the Race Relations Office, the more he felt there was a place for him there and work for him to do. Trlin goes on to say:

> During the same interview he expressed his dislike for the word 'conciliator', and indicated that the emphasis had to change from the need for conciliation to the promotion of understanding. Similar ideas and arguments had been advanced previously by Powles, Mason and Dansey.[9]

Trlin discusses in some detail the various categories of discrimination and such data as is available in the Conciliator's annual reports on the outcome of complaints made in relation to each category. Without following him into the details of his analysis we can note his main observations and conclusions.

As might be expected, there is a predominance of complaints on behalf of Maoris and Pacific Islanders against Europeans. This resembles the Australian situation with the substitution of Aboriginals for Maoris and Pacific Islanders.

Complaints originate mainly in Auckland. Trlin attributes this to the location of the Race Relations Office in Auckland together with the concentration of Maoris and Pacific Islanders in that area When a second office opened in Wellington under the Human Rights Commission some 16 per cent of complaints originated there in the year ended March 1980.

The most notable trend in complaints over the years is a progressive increase in complaints under ss.25 and 9A (the latter having come into operation on 1 September 1978): these complaints of incitement to racial disharmony increased seven fold over the nine years covered in Trlin's report. This increase is probably related to the increase in the number of complaints involving members of a wide variety of other groups, notably individuals identified as 'English', 'Irish', 'Indian' and 'Jewish'.-[0] The number of Maoris involved remained constant - 58 in 1977-78 and 57 in 1980-81 - their proportion of total complaints dropped from 44.9 per cent in 1977-78 to 29 per cent in 1·980-81.

Section 25, with its provision for criminal prosecution, seems to have been ineffective. It was not until 1977 that the police effected the first prosecutions under this Section in a case involving two members of the New Zealand National Socialist White People's Party. They were charged with the publication of an anti-semitic pamphlet, were convicted and 'the conviction was later upheld by the Court of Appeal'.

A difficulty from the police point of view was that under s.25 it was necessary to prove that the material (insulting or abusive statements of a public nature) was intended to excite hostility or ill will. There are obvious difficulties in proving another person's intentions. Unfortunately, in terms of the Act, there was no middle way between launching a police prosecution and doing nothing. The Conciliator had no role under this section. In this situation Powles expressed the view that the Conciliator should be associated with this section, but he apparently went no further than to state this position. Under Deputy Conciliator Mason, however, the

Executive Officer (Sharples) in co-operation with the police informally investigated some complaints of incitement to racial disharmony and this practice was further developed. The Race Relations staff in effect adopted a major role in which they explained their lack of jurisdiction but offered their services and these were 'almost always accepted'. This practice of going outside the limits of their jurisdiction in order to do what was necessary to promote racial harmony seems to have been a feature of the work of the Race Relations Office.

The introduction of s.9A into the Act resolved the situation by giving the Conciliator jurisdiction in matters in incitement to racial disharmony and in removing the limiting factor of having to prove intent. After the introduction of this new section complaints of this nature were dealt with almost entirely under it (in 1979-80 ninety-six complaints under s.9A against three under s.25 and in 1980-81 one hundred and nine complaints under s.9A and none under s.25).

The conciliation process as developed in the Race Relations Office seems broadly similar to that adopted in Australia, except possibly for a greater emphasis in Australia on making it part of an educational process. Beyond a certain point the Conciliator seems to become an adjudicator and he also has more powers to follow through when conciliation fails than does the Commissioner for Community Relations.

When a complaint is received from or on behalf of an aggrieved person, it is first checked to ensure that it falls within the Race Relations Act, that it is *bona fide* and that it has sufficient grounds. The defendant is then informed of the complaint and the intention to make an investigation. While the complaint may be settled in this first contact, it is usually necessary to have several interviews with both parties. These are conducted in an official but semi-formal manner. If such semi-formal meetings fail to resolve the matter, the parties are invited to attend a meeting chaired by the Conciliator who has the power, if necessary, of summons to

ensure attendance. If possible, such meetings are semi¯formal and the power of summons is not exercised. Usually the matter is settled at such meetings. If not, a formal 'hearing' is arranged at which the parties give evidence on oath with a final decision being made by the conciliator. This final stage is not often necessary - five such 'hearings' were held in 1974-75.

Trlin comments on three features of this procedure:

(a) its restraint on the use of the powers available. This approach has been adopted by all the Conciliators on the grounds that it is more likely to lead to a satisfactory solution;

(b) the emphasis is on the changing of attitudes. The investigator tries to avoid driving the defendant into an attitude of hostility and intransigence; and

(c) its aim of bringing about, in as non-abrasive manner as possible, the state of affairs that would have prevailed had the discrimination not taken place *(e.g.* that the complainant got the job he was refused or the lease of the residence he sought).

It is interesting to speculate on the extent to which the defendant's stance is determined by his awareness of the powers which the Conciliator holds in reserve (i.e. to call a formal 'hearing' and if that fails to recommend that proceedings be taken against the offender). These alternatives to a negotiated settlement are strong weapons in the Conciliator's hands.

Sometimes complaints are withdrawn. Trlin is concerned that in some of these cases the complainant is responding to pressure or intimidation. He sees this as one of the weaknesses of complaint-based legislation in which implementation depends upon aggrieved persons lodging complaints. Many victims of discrimination may not lodge complaints because they are afraid that in the long run they

will be victimised for doing so, and those who do make complaints may withdraw them for the same reason.

Throughout its brief history the Race Relations Office seems to have shown a marked readiness to engage in what might be called extra-mural activities. By this term is meant activities not referred to in the Race Relations Act 1971 but which serve the cause of racial harmony and which contribute to the well-being of minority racial or ethnic groups.

From the beginning under Powles the Race Relations Office received requests for assistance with problems relating to race relations which fell outside the terms of the Act. Initially these were referred to the various appropriate authorities - welfare organisations, police, government departments and the like. By 1975, however, it had become established practice for the office to deal with such requests wherever possible and to act as mediator in disputes not directly covered by the Race Relations Act.

The extent of this unofficial activity was such that for the year ending 30 March 1977, some two-thirds of the inquiries dealt with were on matters not falling directly within the complaint areas of the Race Relations Act.

The Race Relations Office also demonstrated its readiness to take initiatives without waiting for authority under the Act by engaging in educational activities to promote racial equality, harmony, tolerance and understanding. Commenting on this, Trlin tells us:

> Broadly educational in nature, these activities are of interest because:
>
> (a) they cannot be related to any specific provision of the Race Relations Act;
>
> (b) they bear testimony to a major shortcoming of the Act, recognised and responded to by successive Conciliators; and
>
> (c) they represent a *preventive* function or approach in the field of race relations as opposed to the *remedial* function established by the Act.12

Powles had criticised the Act as being negative in confining itself to defining some acts as unlawful and others as punishable offences. Using the metaphor of an ambulance at the foot of the cliff instead of a fence at the top, he was defending action already taken by his Executive Officer (Sharples) who had spoken to various audiences on aspects of race relations. He declared that the Office should be so staffed that similar activities could be undertaken in the principal centres in New Zealand.

The stand he took was not challenged. His successors maintained the momentum he initiated. Mason saw the Conciliator's role as that of an 'educator and peacemaker' and put complaint investigation and conciliation as 'secondary to the main role of actively promoting racial equality'.[13]

Dansey in his turn pushed the educational function even more vigorously to the point where he succeeded in getting approval for the appointment of a Community Officer to concentrate on the now well-established educational program. In his second Annual Report, and in subsequent reports, Dansey included a section dealing with the activities of his staff in educational and community development work. These developments seem to have been undertaken with a crusading zeal. Trlin tells us:

> Training, seminar and lecture sessions were either continued or introduced to cater for doctors, nurses, midwives, voluntary workers in citizens advice bureaux, Labour Department employment officers, immigration officers, counter staff and social workers in the Department of Social Welfare, police cadets and recruits, senior officers and officer cadets of the armed services. The objective was to instil an awareness of cultural differences which could influence contact and performance of duties with persons from different ethnic backgrounds. Finally, with the ultimate aim of eliminating violent anti-social behaviour, the Race Relations Office made contact and worked closely with four major Maori 'gangs'. The Executive Officer (Sharples) established work schemes for gang members, as well as taking a mediator role between gangs and the wider community, and between the different gangs themselves.14

All this activity, so far as the legislation was concerned, was *ultra vires!*

Tauroa continued this work. His particular contribution was to systematise it so that there was a minimum duplication of the work of organisations or groups with specific responsibilities. The Race Relations Office acts as a co-ordinator of the work within the whole area in an effort to make the most effective use of the available resources.

A second aspect of Tauroa's contribution was his selection of key target figures in the majority culture for education and attitude change.

> For minority groups to achieve equal opportunity, the decision-makers in a number of institutions had to be educated or persuaded *to provide* such opportunities. Decision-makers approached by Tauroa and his staff included the Governor-General, the Prime Minister, District Court Judges, probation officers, church leaders, secondary school principals, and the members of Rotary clubs:[15]

Some concluding comments

There are some interesting similarities and differences between the New Zealand and Australian Acts and their implementation. Both Acts were passed to enable ratification of the International Convention on the Elimination of All Forms of Racial Discrimination. Both relied on a complaint-based procedure and the use of conciliation. The New Zealand Act provided greater powers for the Conciliator in the investigation of complaints and in recommending that proceedings be taken against the offender when conciliation failed, but did not empower him to engage in educational activities designed to change attitudes and promote understanding. The Australian Act did empower the Commissioner for Community Relations to engage in educational activities as a fundamental part of his responsibilities, but did not give him the power to recommend proceedings against offenders where conciliation failed. Finally, the New Zealand Act outlawed publication of material intended to incite racial disharmony while the Australian Act omitted such provisions.

In practice the emphasis in the New Zealand scene appears to have moved strongly towards the Australian position. The criminal provisions of the Race Relations Act 1971 were rarely used and despite their lack of authorisation the Conciliators and their staff engaged very vigorously in educational programs. On the matter of incitement to racial disharmony there was some convergence in that a new section was added to the New Zealand Act to allow the Conciliator to mediate in such issues, while in the Australian context the Commissioner for Community Relations, though not authorised by the legislation, often used his good offices to discourage the publication of material insulting to minority groups.

It Can be said that, by 1980, there was a lot of common ground in the approach to race relations by the staff of the Offices on both sides of the Tasman, despite initial differences in the emphasis in the legislation. In the New Zealand Act, the stress was on' remedial action rather than on education and the Race Relations Conciliator was given considerable power. In the Australian Act, the emphasis was on education and conciliation, and the Commissioner for Community Relations was given very limited power to take remedial action. In practice the respective office holders seem to have moved to compensate for what they perceived to be the deficiencies of the legislation with the Conciliator developing a pronounced educational role, and the Commissioner using to the limit his power to take remedial action.

CHAPTER 13 ENDNOTES

A.D. Trlin, 'The New Zealand Race Relations Act: conciliators, conciliation and complaints (1972-1981), (1982) 34,2 *Political Science,* 172.

2. The Race Relations Act 1971 (N.Z.), s.24.

3. ibid., s.25.

4. There had been provisions to outlaw the practices covered by the New Zealand Act s.25 in the first draft of the Australian legislation but these had been removed in the Senate on the ground that they infringed the right of freedom of speech. In his annual reports the first Commissioner for Community Relations consistently sought amendments to the Racial Discrimination Act to make incitement to racial disharmony unlawful.

5. A.D. Trlin, op.cit., 171.

6. ibid., 172.

7. ibid., 174.

8. ibid.

9. ibid., 15.

10. ibid., 177

11. ibid., 185.

12. ibid., 187.

13. ibid.

14. ibid., 189.

15. ibid., 189-190.

CHAPTER 14. CONCILIATION AS A CONFIDENCE GAME

The general thrust of this review has been that in practice the Racial Discrimination Act seems to have been more effective than was expected from a consideration of its provisions. Like its New Zealand counterpart, it was passed in order to meet the nation's commitments at the international level and was thus inspired by considerations of external rather than internal relations. Its provisions in respect of both the powers of investigation and the powers of enforcement are weak by comparison with the New Zealand Race Relations Act The Commissioner experienced difficulty in getting a staff together and always worked with a very small staff.

Despite such limitations, it is my impression that a lot has been achieved in those areas where the staff of the Commissioner have been able to make their presence felt. In part this success may be attributed to the efforts of members of Consultative Committees and other persons of good will working in the field; in part it is due to the efforts of the Aboriginal people and to slowly changing perspectives in the community at large; but mainly it seems to be due to the approach adopted by the Commissioner and his staff.

The main feature of this approach has been the consistent policy of relating directly to the victims of discrimination. This point was made repeatedly in the Office where a favourite expression seemed to be 'our task is to relate to the people out there - to the oppressed'. The distinctive features of this approach are not easily conveyed. I propose to try to bring them out by a process of contrast in which I will take up a criticism sometimes made of race relations legislation and its enforcement.

Conciliation in race relations as a confidence game

It **is sometimes claimed that the whole** purpose of conciliation in race relations is to calm down victims of exploitation and

discrimination by giving them the impression that something is being done to alleviate their situation even though, in practice, nothing is changed. The participants are said to go through the motions of investigating the matters of complaint with the objective, not so much of rectifying them, as of taking the heat out of the situation and of making the victims more accepting of their lot..

This line has been developed in very caustic terms by Suschnigg in an attack on conciliation as practised under the New Zealand Race Relations Act.¯ He likens the conciliation procedure to the practice, in well-organised confidence games, of 'cooling the mark out'. By 'the mark' is meant the victim or dupe who is lured into the confidence game by the prospect of lucrative gains from illegal activity. The marks believe that the play has been fixed in their favour and this belief is strengthened when some relatively small initial 'investments' on their part pay off handsomely. The mark then plunges heavily to make a killing, but at that point a 'mistake' or an 'accident' in which the operators stage what is called a 'sting' occurs and most of the confidence team disappears with the cash. The mark is left considerably poorer, perhaps wiser, but almost certainly very angry.

But the mark is not left quite alone. For the confidence team to remain in business it is important that its activities should not be publicised. There is always a possibility that the mark will 'squawk' - that is,go to the police or some other authority - or engage in some other form of attention-getting behaviour such as committing suicide or becoming violent. None of this would be good for the trade, so it is important that marks be 'looked after' to ensure that they do nothing rash and accept any loss quietly.

Marks have good reasons for not squawking or otherwise drawing attention to their role in a play which was anything but creditable. But in the heat of the moment such rational considerations may count for little. To cool the mark down and to minimise the likelihood of unwelcome publicity, one

member of the confidence team stays behind with the mark until pressure subsides. This member is not known by the mark to have any connection with the confidence gang. It is someone who has made the acquaintance of the mark prior to the play and become an apparently understanding and supportive friend. When the rest of the team decamps, the role of this 'friend' is to be on hand to help the victim to ventilate his or her feelings, to provide emotional support and to quietly discourage any behaviour likely to attract attention.

Suschnigg takes this model from Goffman who used the process of 'cooling the mark out' as a paradigm of all those situations in life where people have to come to terms with an unpalatable change in role or status (e.g. loss of a job or failure to obtain a promotion, break up of a marriage, failure of a business, incapacitating illness or injury and, in the ultimate case, imminent death through a terminal illness or an impending execution) .[2] In many such cases there are persons who take the role of helping the sufferer to bear his fate stoically. Among such practitioners, Suschnigg would include the Race Relations Conciliator and, among the marks, the victims of racial discrimination.

He states his case in the following terms:

> Are the Race Relations Conciliator and his staff engaged in the cooling out of marks? A look at the Conciliator's Annual Reports shows a steady decline in the proportion of cases found 'justified' and a corresponding increase in the 'rectified - no decision' category. This trend is quite in line with the stated intention of the Conciliator who sees the increase in the proportion of the 'rectified - no decision' cases as a 'direct reflection of the conciliatory techniques developed by (his) staff'. To see the effect of these conciliatory techniques let us consider some examples.[3]

He then goes on to describe four cases taken from annual reports of the Race Relations Conciliator (cases A99, A124, W3 and W23). It will be sufficient for our purposes to consider his discussion of A99.

This was a complaint against Auckland taxi companies. The complaint 'alleged that empty taxis failed to pick up Polynesians who had been waiting at the head of the queue but cruised past to pick up non-Polynesians a short distance off'. After the complaint was accepted as meeting the necessary criteria for investigation (i.e. being made in good faith, not vexatious or frivolous, etc.), 'the play got under way'. It did this, in Suschniggs's words,

> ...by turning a personal grievance about taxi services - or rather lack of taxi services - into a general consultation on the difficulties taxi drivers encounter at taxi ranks. There were representatives from 'relevant authorities' expressing their concern at this or that factor which might have contributed to 'the problem' - namely violence on the ranks, particularly among Polynesians; inadequate lighting; unsatisfactory siting and lack of supervision of taxi ranks; a shortage of taxis; and the inability of new migrant Polynesians to 'appreciate the effects of liquor after prolonged drinking'. The complainant was advised that he had a right to complain. His complaint was certainly generating many promises; everybody who was anybody in the taxi business was going to do his good deed; there were to be submissions to the Royal Commission on Liquor, circulars to Polynesian churches, more meetings between the city council and taxi companies, police patrols of taxi ranks and possibly security officers just for taxi ranks.
>
> Wonderful. But what about our complainant? For all we know he might again be waiting at a taxi rank watching cabs cruise past to pick up someone else. But he can now do so in the knowledge that he had been right to complain. His complaint, unlike most others, was found to be 'justified'. While he is waiting for the cab he also knows that the meeting agreed 'it should reconvene at some later date to discuss and re-assess the situation.[4]

I would suggest, in fairness to the New Zealand Conciliator, that there may be an alternative explanation of the decline in the proportion of cases found 'justified' and an increase in the proportion of 'rectified - no decision' cases which Suschnigg *sees* as a softening in the Conciliator's enforcement of the Act. As previously noted, the absolute number of complaints from Polynesians has remained constant over the years, while their proportion of the total case load has

declined sharply due to an increasing tendency of people of European stock to lodge complaints.[5] If we are to judge by the Australian experience as outlined in Chapter 5 we would expect to find a high proportion of these latter complaints to fall into some such category as 'rectified - no decision'.

My interest, however, is in Suschnigg's description of how the complaint against the taxi companies was handled. As he describes it, the conciliator - or his staff - related not to the complainant, but to representatives of the established order. In his words, 'everybody who was anybody in the taxi business' seems to have been consulted and one has the impression of the Polynesian who put in the complaint waiting somewhere out in the cold while discussions went on. If this is an accurate picture, one can understand Suschnigg's biting comments.

We may ask how such a complaint might have been dealt with by the conciliators working under the Australian Act. In answer it can be said that they would not get deeply involved in a general complaint about discrimination by taxi drivers any more than they would get involved in a general complaint about discrimination by hotel proprietors or estate agents. The complainant would be asked to supply details Of a specific case in which a taxi driver discriminated against one or more members of a given race waiting in a queue, giving such details as the taxi number, the company to which it belonged, and the date, time and place of the incident. When such information was obtained, the matter would then be taken up with the taxi company and, if necessary, a compulsory conference convened at which the complainant, the driver of the cab, the taxi company manager and such other persons as might assist in the resolution of the matter would be required to attend. At such a conference every effort would be made to reach a settlement acceptable to the complainant. Failing such attempts at settlement, a certificate would be issued to the complainant to enable him to take civil action under the Act for damages in a court of competent jurisdiction.

The settlement of the matter of the individual complaint is basic in the Australian approach. Under no circumstances would a complaint become - as Suschnigg suggests - a mere talking point for a general discussion about the problems of the taxi industry. But neither would the matter be confined to the individual case or incident. The specific complaint would be used as an entry point into the network of race relations involved, with the conciliators moving among the different parties and endeavouring to bring about changes that would minimise the likelihood of further incidents similar to that which gave rise to the complaint.

The activity would be pursued in a low key, patient and persistent manner, despite such obstacles as the deficiencies in the law, the inadequacies of complainants and manipulations by power groups and communities. A feature of the work of the Office has been the tenacity with which it has held to its role of enabling aggrieved persons to obtain remedies where racial discrimination was alleged and appeared to have occurred.

There are several cases in the files which provide excellent examples of the difficulties and opposition which the Office encountered and of the persistence and patience with which it overcame them in its efforts to combat racial discrimination. Perhaps the most outstanding is the case of *Koowarta v. Bjelke-Petersen and Others*[6], with which constitutional lawyers are now familiar, though the detailed events leading up to it are less well known.

The *Koowarta* case began with the receipt of information from a church organisation in Brisbane. The aggrieved persons were members of an Aboriginal community on Cape York on whose behalf the Commonwealth Aboriginal Land Fund Commission had negotiated to buy a nearby pastoral lease. The responsible Queensland Minister refused approval to the transfer of the lease. Approaches were made to the Queensland Government for help in resolving the matter, but these were not acknowledged.

The initial difficulty was to discover the identity of the aggrieved persons or party. Communication with the unknown Aboriginals on Cape York presented the Office with a daunting task, but with the help of the church this was done. Persons were identified and brought to Canberra to attend a compulsory conference. Two Aboriginals from Weipa and Coen, a senior minister of the Uniting Church and the Chairman of the Aboriginal Land Fund Commission attended.

The conference clarified the position of the parties including that of the Commissioner for Community Relations. The aggrieved persons were the members of the particular group of Aboriginals who also became complainants, represented by John Koowarta. This conference occurred in mid-1978, approximately one and a half years after the matter came under notice.

The matter was again put to the Queensland Government with no response. It might easily have lapsed for failure to obtain a response and through an inability to maintain effective working communication with the aggrieved community. But the Office held the view that the alleged act of discrimination could not be allowed to remain unresolved. It was based upon a Queensland Government policy expressed in a Cabinet decision which had been quoted in the Queensland Parliament.

The Commissioner for Community Relations referred certain questions to the Attorney-General's Department for legal advice. The advice received from the Solicitor-General did not favour continuing with the conciliation. Acceptance of it would have meant not proceeding. It was considered, however, that the issue at stake went to the very heart of the legislation and should be pursued to the limit.

The Queensland Government was again asked to help in resolving the matter by responding to the allegations. Again it failed to acknowledge the complaint. The Commissioner for Community Relations endeavoured to convene a compulsory conference. He issued directions to attend a conference to certain Ministers of the State of Queensland. The Attorney-General's Department advised on the question submitted to it in a manner which

would have prevented the Commissioner from proceeding. The advice was not heeded.

Later, the day before the conference, the Attorney-General wrote suggesting that the conference not be held. As with the previous advices, the Commissioner chose not to heed this suggestion. He continued on the course of trying to resolve the matter.

Prior to the commencement of the conference in Brisbane in July 1979 - by now two and a half years had gone by - an officer of the Queensland Solicitor-General handed the Commissioner a letter notifying him that the Queensland Ministers would not be attending, challenging the validity of the Racial Discrimination Act and indicating certain other positions adopted by the Queensland Government.

The Commissioner, at the time the conference was due to start, and in consideration of the written advice from the Queensland law authorities, indicated his intention to issue his certificate under the Racial Discrimination Act. He subsequently issued his certificate to enable the aggrieved persons to pursue remedies through civil court processes.

The aggrieved persons commenced action in the Supreme Court of Queensland. The matter came to court in February/March 1981 - four years after the matter first came to notice. The Queensland Government challenged the validity of the Racial Discrimination Act in the High Court which on 11 May 1982 rejected Queensland's position and upheld the Act. The High Court's decision and certain judgements supported the position adopted by the Commissioner.

The *Koowarta* case has been quoted at length to make the point that conciliation, as practised under the Racial Discrimination Act, does not fit the model of 'cooling the mark out'. Rather, it indicates the dogged persistence with which, with very limited resources, and with, at times, something less than enthusiastic support from higher authorities, the Commissioner and his staff pursued the cause

of just and fair treatment for gravely disadvantaged people. Far from relating to the established social and bureaucratic order, which Suschnigg suggests applied in the cases he lists, the Office identified itself with the people 'out there' in the community who were experiencing oppression and deprivation.

CHAPTER 14 ENDNOTER

1. P. Suschnigg, 'Caution - marks cooled out', (1979) 7 *Comment*, 18-20.

2. E. Goffman, 'On cooling the mark out', (1962) 15;4 *Psychiatry*, 451-63.

3. P. Suschnigg, op.cit., 18.

   ibid. ,18-19.

5. A.D. Trlin, 'The New Zealand Race Relations Act: conciliators, conciliation and complaints (1972-1981)', (1982) 34,2 *Political Science*, 177.

6. *Koowarta v. Bjelke-Petersen and Others* (1982) 39 A.L.R. 417 hereinafter referred to as *Koowarta.*

CHAPTER 15. REVIEW AND REFLECTIONS

The Racial Discrimination Act 1975 from the beginning met with considerable criticism on the grounds of the limited investigatory powers of the Commissioner, the relative lack of sanctions against offenders and the heavy reliance on education and conciliation as the means whereby racial discrimination was to be combated. The subsequent difficulties encountered by the first Commissioner in staffing his Office did little to change the view that the Act would prove ineffective.

Despite the pessimistic predictions, there can be little doubt that much has been accomplished with the limited resources available. These achievements can be credited largely to the energy and activity of the minority groups subject to discrimination and to the dedication and determination of the Commissioner and his staff in using their statutory powers to the full.

Over the last two decades a marked change has been taking place in Australian society. Part of this change has been a developing confidence and assertiveness in respect of their rights on the part of both newcomers to the country - the so-called 'ethnic' communities - and its longest residents - the Aboriginal people. The aspirations of these groups, while meeting with resistance from established sections of society, have also found considerable support in the wider community. The passing of the Act was both a reflection of these developments and a step towards further change. The role of the Commissioner and Human Rights Commission officers has been to work effectively with these forces for change towards more equitable and harmonious community relations.

The two strands to this task have been the modification of attitudes through education and the prevention of acts of discrimination through the settlement of matters that give rise to complaints. Public education has been pursued at all

levels from the use of the national media to work with relatively small, but influential, groups in the area of community relations (e.g. training courses for police, teachers and members of the health professions). Complaints have been settled by conciliation conferences, both formal and informal.

Our concern has been with the settlement of complaints. In this regard we noted a difference between the complaints made by members of ethnic communities and those made by Aboriginals. Discrimination against Aboriginal people was more likely to consist of acts specifically forbidden and to constitute more extreme and offensive denials of rights. Discrimination against members of ethnic groups tended to arise from institutionalised procedures rather than from the unlawful acts of individuals. The role of the Commissioner in dealing with complaints was therefore somewhat different in the two cases. With the ethnic communities, the main task was to effect change at the institutional level. Where this was done, the members of these groups were largely able to resolve the issues themselves. With the Aboriginal people, however, the settlement of the matter tended to require a more direct and personal confrontation involving respondent, complainant and conciliator. These confrontations often took the form of a compulsory conference.

It was the view of the Commissioner that the settlement of complaints, as separate and isolated events, would constitute treatment of the symptom rather than the cause - a 'band-aid' treatment. To meet the situation, a systematic approach evolved by which the conciliation of matters of complaint was integrated into a community education or development program. The key element in this integrated approach was the formation of Consultative Committees consisting of persons committed to the eradication of all forms of racial discrimination and the promotion of harmonious community relations. These committees, which varied greatly in structure and membership, came to form a network across the nation. They served the purposes of:

(I) constituting a presence in each local community thereby discouraging the more overt and more virulent forms of - racial discrimination;

(2) providing a channel of communication between different groups in the local community;

(3) constituting an information service which enabled the Commissioner to maintain contact with events over a large area; and

(4) acting as a nucleus for the initiation of change in the local community by the use of educational and conciliatory means. These activities ranged from the settlement of disputes and complaints at an individual level to the use of local media to publicise cases of discrimination and harassment.

The Consultative Committees formed the bridge between .complaint settlement and the broader educational work aimed at changing community attitudes. By including representatives of the Committees in conferences, both informal and compulsory, called to resolve disputes, such members were given experience in the negotiation processes of complaint settlement and also were given status as potential conciliators and negotiators in other issues which might arise in the area. The comments of many such members testify to the value in terms of enhanced confidence, both in themselves and in the potentialities of negotiation, gained from such participation.

The development of the Consultative Committees, and the relatively informal conciliatory procedure employed, were particularly suited to the demographic aspects of the work with Aboriginals, who, for the most part, live in, or in the vicinity of, provincial centres. In these communities, where people are much better known to each other, there are greater opportunities for the exertion of influence on the community as a whole than would apply in a context of urban isolation and anonymity.

The detailed aspects of the conciliation methods employed have been determined by the nature of the task and the philosophy of the conciliators. We noted, when comparing the different forms of intervention developed by the Community Justice Centres, the Commissioner for Equal Opportunity in South Australia and the Commissioner for Community Relations, that the goals were somewhat different in the three cases. While, in the Justice Centres, the objective is to cultivate the ability of the disputants to work together on the problems arising in their continuing relationship, the South Australian Commissioner is primarily concerned with achieving an equitable settlement of a matter of complaint. In the case of the Commissioner for Community Relations, the situation is more complex in that, while a fair settlement of the matter giving rise to the complaint is the primary goal, the cultivation of better communication, and the development of constructive negotiation between members of the local groups involved in the disputes, also has a very high value. This increased complexity of the task calls for a flexible and informal approach which usually involves more people in the negotiations in any one case than would apply in either of the other conciliatory operations. The 'footwork' in which the conciliators go around the various relevant parties - the police, hotel proprietors, Aboriginals, estate agents, store keepers and various other official and unofficial community groups - is undertaken, not merely to obtain information in the course of an investigation, but also to exert influence towards better communication and understanding between all concerned. A phrase frequently used by the conciliation staff to describe the objectives of their 'footwork', is that they work to 'settle down' the tensions and disturbances of the community.

The Racial Discrimination Act provided an opportunity for conciliation teams to work on the reduction of tensions in the scattered rural communities. It established a basis for constructive negotiation between Aboriginal and non-Aboriginal groups at a local level. It became possible to substitute talk for physical action and reason for the use of force.

Opposing parties - e.g. police and representatives of Aboriginal groups - could be brought together and induced to listen to each other, at first somewhat reluctantly, but later more willingly, as they came to see that the gulf which separated them was not as unbridgeable as they believed.

Although superficially a weak and toothless piece of legislation, the Act subtly redefined relations between Aboriginal and non-Aboriginal persons. It provided a legal basis on which the former could take a stand and demand respect for their rights. It put discriminators on the defensive in imposing on them the obligation to justify their behaviour or acknowledge their guilt and make amends. By making explicit the superior moral and legal position of the victims of discrimination, it strengthened their part in an area where previously it had been weak - in rational discussion and negotiation with discriminators. The interesting consequence has been that in the conciliation conference it is likely to be the discriminators who behave in the most irrational ways and who are most likely to give vent to explosive emotional outbursts.

It is to be noted, however, that the effectiveness of the Act has been dependent on its rigorous implementation. Initially the attitude of the discriminators seems to have been broadly similar to that of the critics in regarding it as innocuous. But the persistence and determination with which the Commissioner and his staff followed up each case until a satisfactory settlement was achieved, gradually gained their respect. The *Koowarta* case is exceptional in the length of time over which it was pursued, but the pattern of unrelenting follow-through is characteristic of the work of the Office. Even those Aboriginals who were critical of the limitations of the Act commented favourably on the way the conciliators 'kept coming back'.

In the absence of more detailed information on the way the Race Relations Act has been implemented, it is hazardous to comment on its workings. The history of race relations in New

Zealand differs markedly from the Australian record and no doubt such differences affect current practices in attempts to promote community harmony. Without closer observation of the scene, and information from participants in the remedial actions taken, we are in no position to assess the extent to which Suschnigg gives a fair representation of the work being done.

In respect of the Australian scene one can, without entirely adopting Kelsey's radical position, agree with his comments to the effect that the resolution of such matters as racial discrimination cannot be achieved without some disturbance of the existing social order, including a changed perception of themselves and their place in society on the part of the victims of discrimination. One must share in his endorsement of Mr Justice Wootten's comments that

> to achieve things in relation to Aboriginal advancement ...nothing succeeds in any meaningful •way unless you do have real Aboriginal involvement, you do have something being done or some movement which is felt by some significant number of Aboriginals to be theirs, to be something they want, to be something they can identify with, and not just something that is handed down or provided from outside.-

While it is of critical importance that the Aboriginal people be committed to, and have an initiative in, activities directed towards improving their situation, they cannot be expected to 'go it alone' particularly when the going gets to be particularly arduous. This brings us to that aspect of the Act which seems to be most in need of modification. When conciliation fails and the Commissioner is unable to achieve a fair settlement, there should be some means whereby he, or some other agency of government, can continue to work with the victims until a satisfactory outcome is achieved. Here we are thinking of cases in which the Commissioner is satisfied that the complaint has substance and that further action should be taken to resolve the matter. The present arrangements do not work. Complainants issued with certificates which entitle then to bring the matter before a court are not proceeding

with their. cases. The .presumption must be that they are in some way inhibited from proceeding alone with litigation.

It is important that some cases reach the courts for decision in order to clarify the role of the legislation, particuarly in respett of such matters as the appropriate level of redress to be made to persons injured by discriminatory practices. It is also necessary in order to encourage the participants to work for conciliated settlements.

On the side of the implementation of the Act, the main weakness up to the time of the preparation of this report was the lack of an adequate staff establishment which had caused the work to be restricted to less than half the continent. With the development of co-operative arrangements between the Commonwealth and States where comparable legislation exists (i.e. Victoria, New South Wales and South Australia) and with the establishment of State Offices of the Human Rights Commission where no comparable State legislation exists, the work can be expected to extend to the whole country.

The approach developed under the Racial Discrimination Act has been innovative and effective. This report has attempted to document that approach and to ensure that whatever is of value in it is preserved as the next generation of conciliators takes up the task. If there is to be continuity and consistency in the implementation of the legislation, it will be necessary to provide a training or development program for newcomers to the work. It would be unfortunate if there were to be marked differences between the ways racial discrimination legislation was implemented in different parts of the country. Such a training or development program would have to Provide for:

(1) the adoption of a consistent 'philosophy' of conciliation in community relations;

(2) the proviiion of 'apprenticeship' experience in the field; and

(3) the development of skill in conducting conciliation conferences.

A consistent **philosophy**

Such matters as the goals of the legislation, the relative weight to be given to the substance of the dispute, or the relationship ***between*** the parties, the role of Consultative Committees, the linking of the complaint settlement process with community education and change, would need to be discussed and some common ground developed. The complex demands made on the conciliator as one who has a responsibility both to enforce the provisions Of the law and to promote good relations between disputing parties would be among the more specific issues to be examined.

Apprenticeship experience

While it is possible for novice conciliators to find their own way in establishing contact with the relevant persons in the area of race relations in each provincial centre, their task would be enormously simplified by accompanying experienced officers who are already well acquainted with the social terrain. Getting to 'know the ropes' in rural cities and towns where one must make contact with such agencies as the police, the clergy, the business community, the media, Aboriginal and ethnic groups, the schools and, in particular, such figures as hotel proprietors and estate agents, is an important part of the work of the conciliator.

Skill in conducting conferences

As we have noted elsewhere, the compulsory conferences conducted under the Act are often very intense encounters in which feelings, particularly those of the respondents, are likely to reach explosive proportions. The conciliator must be skilled not merely in defusing, or taking the heat out of, such emotional confrontations, but in using them constructively. The skilled conductor of interpersonal encounters (in group or family therapy, in sensitivity

training groups or in groups working toward conflict resolution) welcomes the spontaneous expression of what the individual actually feels and believes as contrasted with a 'staged' or controlled front which might be presented. Such open expression is necessary if an honest exchange is to take Place and durable resolution of the issue is to be arrived at.

It is unusual to find persons who, without specialist training, are comfortable in dealing with expressions of Anger and hostility, either when it is directed against them personally, or when it is directed against others in the group in such a way as to threaten the good order within the group. In such circumstances most people react defensively either in self-justification or in an attempt to silence the disturber, rather than attending to that individual and trying to understand what he or she is concerned about.

The basic skill that has to be cultivated is the ability to listen. Effective listening is a very active process in which the listener attunes himself or herself to the other party's thinking and understandings the position from that perspective. As Fisher and Ury put it in their discussion of negotiation:

> The ability to see the situation as the other side sees it, as difficult as it may be, is one of the most important skills a negotiator can possess. It is not enough to know that they see things differently. If you want to influence them, you also need to understand empathetically the power of their point of view and to feel the emotional force with which they believe in it. It is not enough to study them like beetles under a microscope; you need to know what it feels like to be a beetle.[2]

There is substantial literature on the cultivation of interpersonal 'helping' skills. Brammer has written a particularly useful introductory guide.[3] On a more general level, Clive Graham (Head of TAFE's Division of Social Sciences in New South Wales) has developed a fifty-four hour training program for 'mediators' in Community Justice Centres.[4] This program, which has been worked out in

considerable detail, could easily be adapted for inclusion in a course for conciliators. While conciliators under the Racial Discrimination Act would need to be somewhat more interventive than the cac 'mediators', the basic skills involved in turning hostile confrontations into constructive problem solving negotiations are essentially the same in both cases.

In conclusion, while I believe the Racial Discrimination Act needs to be strengthened to deal with those situations where conciliation fails, within its limits it has had a notable impact in those areas where it has been implemented. Conciliation, as conducted under the Commissioner for Community Relations, has taken the form of a low key approach directed towards enlisting the co-operation and compliance of the different communities. It has been pursued with diligence, patience, persistence and compassion. The guiding principle on which it has been based, is that of being hard on the issues, but soft on the people.

CHAPTER 15 ENDNOTES

1. B. Kelsey, 'A radical approach to the elimination of racial discrimination', (1975) 1,2 *University of New South Wales Law Journal,* 87.

2. R. Fisher & W. Ury, *Getting to yes: negotiating agreement without giving in,* Houghton Mifflin, New York, 1981, pp. 23-4.

3. L.M. Brammer, *The helping relationship,* Prentice-Hall, New Jersey, 1973.

4. C.H. Graham, TAFE Community Justice Centres Mediators Course, unpublished roneod paper, 1981..

APPENDIX

THE TERMS 'MEDIATION' AND 'CONCILIATION'

There is some controversy over the use of the terms mediation and conciliation. I have taken the position that mediation is the appropriate term for that process in which a go-between assists in achieving a settlement of some matter which may (or may not) involve a dispute between two parties. The parties involved are not able, or not willing, or do not find it convenient, to negotiate directly with one another unaided. The term 'conciliation', on the other hand, is an appropriate term for that process in which a third party acts to bring together two parties who are in dispute so that they can reach a better understanding and acceptance of each other's positions and resolve the matter between them.

I would call the practice of the Community Justice Centres 'conciliation', though I would see it as falling towards the mediation end of the gradient outlined in Chapter 2. Their choice of the term 'mediation' is an attempt to emphasise the fact that they try not to impose their solutions on the disputants, but rather to let the disputants develop their ability to find solutions for themselves. They want to emphasise the non-directive quality of their intervention.

In support of my position, I submit the following definitions from the *Oxford English Dictionary.*

Conciliate (v) to combine, unite physically or in thought or feeling, to make friendly or agreeable, to recommend, to cause to meet, to procure, acquire, produce

Conciliator (n) One who or that which conciliates; especially one who leads opposed parties to be friendly to each other; a peace maker, arbitrator

Mediate (v. trans.) To divide in the middle, halve; to act as an intermediary

(v. intrans.) To occupy an intermediate or middle place or position; to be between, usually to form a connecting link or transitional stage between one thing and another

Mediator (1) One who intervenes between two parties, especially for the purpose of effecting reconciliation; one who brings about (a peace, a treaty) or settles (a dispute) by mediation

(2) Theol. One who mediates between God and man; applied especially to Jesus Christ

(3) A go-between; a messenger or agent.

There is in the term 'mediation' an implication of standing between or separating as well as of connecting.

'Conciliation' has more the implication of bringing separated entities together.

The term'mediation' is commonly used to describe the efforts of third parties to achieve settlements in international disputes. It would be regarded as presumptuous for a person or political entity to undertake to conciliate two nations in dispute. The closest approach I can think of to the use of conciliation at the international level in recent times was President Carter's work at Camp David to bring about a settlement between Egypt and Israel or, in personal terms, between President Sadat and Prime Minister Begin.

In the discussion of conciliation in Chapter 2, I used a single dimension - the extent to which the third party determined the terms of settlement. A more differentiated, but more complex, analysis might have been achieved by using the two dimensions of:

(1) the locus of determination of the terms of settlement; and

(2) the degree to which the process is oriented towards the substance of the dispute rather than towards the relationship between the parties.

On such a two dimensional model I would see mediation, *as abstractly defined,* as leaving the terms of settlement in the hands of the principals and as being oriented towards settling the substance of the dispute rather than being relationship oriented. Since the work of the CJCs is clearly oriented towards the relationship, I believe the term mediation is inappropriate in relation to their activities.

The term conciliation is basically relationship-oriented while leaving the terms of settlement in the hands of the principals.

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