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BEHIND THE CONCILIATION DOORS
Settling Discrimination Complaints in Victoria

Dominique Allen

The vast majority of discrimination complaints do not reach a substantive hearing. Most are resolved through alternative dispute resolution (ADR), or withdrawn or settled prior to hearing; however, there is little publicly available information on the outcomes the parties negotiate prior to hearing. This article presents a study of settling discrimination complaints in Victoria based on interviews conducted with participants in that process. It explores the reasons why parties decide to settle rather than litigate, and examines what outcome complainants initially seek and what they ultimately settle for. Since many of the findings are consistent with earlier empirical studies, the article concludes by canvassing recent reform options that would address persistent problems with anti-discrimination law and improve its effectiveness in addressing individual complaints and wider discrimination.

Discrimination complaints are resolved in much the same way across Australia. A person who believes that they have experienced unlawful discrimination can lodge a complaint at the statutory equality commission in their jurisdiction or the Australian Human Rights Commission (AHRC). The equality commission investigates the complaint and, if it is within its jurisdiction, attempts to resolve the complaint — usually through conciliation. The majority of complaints accepted by the equality commission are resolved at this stage. If the parties are not able to resolve the complaint, the complainant can ask the equality commission to refer it to the tribunal, where the complaint may undergo mediation before a full hearing. Most complaints are settled, withdrawn or struck out on procedural grounds. Very few are decided at hearing. Since the majority of discrimination complaints are

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Dominique Allen was recently awarded a PhD from the University of Melbourne. This article is taken from her PhD thesis and draws upon research conducted for the project ‘Improving the Effectiveness of Australia’s Anti-discrimination Laws’, which was funded by the Australian Research Council and the Victorian Equal Opportunity and Human Rights Commission. The author is grateful to Beth Gaze and Jenny Morgan for their valuable comments and feedback on an extended version of this article, all the interview participants, Aditi Gorur for transcribing the interviews and the anonymous referee for their helpful comments.

1 The statutory agency is typically identified as the Anti-Discrimination or Equal Opportunity Commission, Authority or Board. For ease of reference, ‘equality commission’ is used to describe the agency.

2 ‘Tribunal’ and ‘court’ are used interchangeably except in reference to a specific court or jurisdiction.

3 See further Table 1.
resolved prior to hearing, it is valuable to go behind the conciliation doors to explore what factors may be contributing to this.

This article presents a study of the process of resolving discrimination complaints in Victoria based on interviews with Victorian Equal Opportunity and Human Rights Commission (VEOHRC) staff and a selection of barristers, solicitors and non-legal advocates practising discrimination law in Victoria. The study uses Victoria as a representative model of anti-discrimination law since the law and complaint resolution process vary slightly across the jurisdictions. The purpose of the study is to examine why the vast majority of discrimination complaints settle outside the formal legal system. The study does not consider the Commission's complaint handling processes or conciliation. There is a lack of publicly available information about settlement outcomes in discrimination complaints in Victoria, so the secondary purpose was to gather this information.

The first section presents an overview of the problems commentators have identified with anti-discrimination law and discusses the research method of this study. Based on the interviews conducted in Victoria, the next section presents the primary reasons parties choose to settle, and section 3 examines the outcomes complainants initially seek compared to what they ultimately obtain. The final section of the article considers options available to address the identified problems, and notes that there are limits to how effectively an inherently reactive and passive model can address discrimination.

Background to the Study

A Comparison of Discrimination Complaints in Three Jurisdictions

Very few discrimination complaints are funnelled from the equality commission to the tribunal for a substantive hearing. The overwhelming majority are resolved through alternative dispute resolution (ADR) or withdrawn or settled prior to hearing. This is shown most coherently by comparing the number of complaints lodged at the equality commission with the complaints referred to the tribunal and the number of decisions. Table 1 documents this in three jurisdictions: Victoria, Queensland and federally.

The complaint data is drawn from the equality commissions’ 2006-07 annual reports and tribunal decisions. The data are indicative but not completely reliable.

4 Sexual harassment and vilification complaints have not been as difficult to enforce so they are not considered.

5 It is outside the scope of this article to consider how differences in processes may affect settlement - for instance, the absence of a specialist adjudicator in Victoria compared with Queensland. See Hunter and Leonard (1995), p 11ff, discussing variations in complaint-handling processes in three jurisdictions.


7 The AHRB and the Queensland Anti-Discrimination Commission record complaints made about multiple attributes multiple times. To ensure that this table contains the most accurate data, the total number of complaints was used and sexual harassment and
Sexual harassment and racial hatred or vilification complaints could not be extracted from all data. It is also difficult to match the equality commission’s complaint information with the tribunal’s data because the tribunal decisions’ data relate to 2007, whereas the equality commissions report by financial year. Finally, complaint levels represent the number of complaints the equality commission received; they do not necessarily reflect the level of discrimination in society. Despite this, it is still possible to draw valuable conclusions about the process.

Table 1: Complaint resolution, 2006–07

<table>
<thead>
<tr>
<th>Complaint resolution</th>
<th>Victoria</th>
<th>Queensland</th>
<th>Federal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discrimination complaints received by the equality commission</td>
<td>1550</td>
<td>562</td>
<td>1779</td>
</tr>
<tr>
<td>Complaints referred to conciliation</td>
<td>37.43%</td>
<td>432</td>
<td>38%</td>
</tr>
<tr>
<td>Complaints resolved at conciliation</td>
<td>Unknown</td>
<td>60%</td>
<td>69%</td>
</tr>
<tr>
<td>Complaints referred to the tribunal/court</td>
<td>209</td>
<td>110</td>
<td>98</td>
</tr>
<tr>
<td>Complaints resolved through mediation at the tribunal/court</td>
<td>65%</td>
<td>57%</td>
<td>Unknown</td>
</tr>
<tr>
<td>Substantive decisions (2007)</td>
<td>11</td>
<td>9</td>
<td>12</td>
</tr>
</tbody>
</table>

The data in Table 1 show how complaints are funnelled through the system. Of the total complaints lodged at the equality commission, a third were referred to conciliation and two-thirds of those complaints were resolved. Because of the differing ways in which the equality commissions record complaints, it is difficult to trace what happens to the one-third that do not resolve at conciliation. What can be determined is that, across the three jurisdictions, only 5-19 per cent of complaints are referred to the tribunal each year and two-thirds of those complaints are resolved through mediation at the tribunal. The tribunal makes relatively few vilification complaints were extracted where possible. Complaints are not considered by area or attribute, as the data are not comparable on that basis.

8 The total number of complaints in Queensland includes 120 complaints about sexual harassment and 17 about vilification. Sexual harassment and racial hatred complaints could not be excluded from the total federal complaints. The number of complaints the VEOHRC referred to the tribunal relating to sexual harassment or vilification was not stated.

9 It is not possible to express this as a percentage. The Commission’s annual report implies that this refers to all types of complaints, not only discrimination complaints.

10 This is the applications relating to discrimination matters which were filed at the Federal Magistrates Court, which represented 1.3 per cent of applications.

11 A total of 34 discrimination matters were referred to mediation. Of all federal law matters that were mediated, more than 50 per cent were resolved.
 substantive decisions each year, which is consistent across these jurisdictions. Therefore, the overwhelming majority of discrimination complaints are not resolved through a hearing.

In addition to there being few substantive decisions each year, the equality commissions publish limited information about the outcomes reached at settlement. The information published by the VEOHRC is limited to some de-identified case studies in its annual report. The Victorian Civil and Administrative Tribunal (VCAT), which adjudicates discrimination complaints, does not release information about settlements reached at mediation. None of the Australian equality commissions publishes a comprehensive catalogue of annual settlements. The information they disseminate is limited to de-identified case studies and sample outcomes in their annual reports. Some list examples of conciliated complaints on their websites.

The fact that so few discrimination complaints reach the courts might suggest that the complaint-resolution system is working effectively and as intended. It could be argued that parties are aware of their rights and the decision the court is likely to make, so they do not need to use the formal legal system. However, the low number of decided cases is not new to anti-discrimination law; it characterises the legislation's history in many jurisdictions. For instance, in 1993 in New South Wales, Thornthwaite found that an average of 6 per cent of employment discrimination complaints were referred to the tribunal during the legislation's first

12 Most decisions relate to procedural applications, such as costs and strike-out applications.
13 VHREOC (2006-07), pp 25-30. Other than this, the information available about complaints is limited to statistics about the attribute, area, gender of the complainant and type of respondent. Information is also provided about the number of complaints received, the number finalised and the time taken to finalise them.
14 The exception to this is if the Tribunal makes orders giving effect to the settlement reached by the parties: Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 93(1). It did not do so during 2006-08.
decade. The majority of complaints concluded at conciliation were dismissed by the tribunal or resolved privately.\textsuperscript{17} Hunter and Leonard reached a similar conclusion in their study of sex discrimination complaints in three jurisdictions in 1989–93.\textsuperscript{18} This makes it harder to maintain the argument that the law is actually working. Instead, it suggests that the law is not operating as intended, and there is a shortage of substantive decisions because complainants are disinclined to use the formal legal system to resolve their complaint.

**Problems with Anti-Discrimination Laws**

Commentators have identified significant problems with the law that may explain the lack of decisions. Courts have interpreted the substantive law technically and restrictively, making it difficult for the complainant to establish discrimination.\textsuperscript{19} The complainant bears the onus of proof in most situations,\textsuperscript{20} which exacerbates the interpretive problems. It is difficult for the complainant to meet their burden,\textsuperscript{21} especially in race discrimination complaints.\textsuperscript{22} The direct evidence needed to prove discrimination is usually in the respondent’s possession, so the complainant must rely on circumstantial evidence and ask the court to draw an inference of discrimination. Courts are reluctant to do this in the absence of cogent evidence,\textsuperscript{23} and they regularly subject evidence to the higher standard required by *Briginshaw v Briginshaw*.\textsuperscript{24} In many jurisdictions, the complainant risks a costs order against them if litigation is unsuccessful.\textsuperscript{25} Since discrimination complainants do not generally qualify for Legal Aid funding, the complainant is unlikely to have representation.\textsuperscript{26} Respondents are more likely to have legal representation and they have challenged unfavourable decisions at first instance, which has generated a body of case law decided in their favour.\textsuperscript{27} Furthermore, while conciliation is attractive because it is a cost-effective, flexible and expedient way to resolve legal disputes compared with litigation, there are problems with using conciliation to resolve discrimination complaints. Conciliation may reinforce the power

\textsuperscript{17} Thomthwaite (1993), pp 40–45.
\textsuperscript{20} The complainant bears the onus of proof in Victoria and in most Australian jurisdictions. The exceptions are indirect discrimination in Queensland and federal sex and age indirect discrimination complaints: *Anti-Discrimination Act 1991* (Qld), ss 204, 205; *Sex Discrimination Act 1984* (Cth), s 7C; *Age Discrimination Act 2004* (Cth), s 15(2). See further Allen (2009a), pp 586–87.
\textsuperscript{22} Hunyor (2003); Gaze (2005).
\textsuperscript{23} Hunyor (2003), pp 540, 548–51.
\textsuperscript{25} Gaze (2005), pp 181–82.
\textsuperscript{27} See Gaze’s discussion of this in the federal jurisdiction: Gaze (2000), p 126.
imbalances between the parties to the complainant’s detriment. If there are lawyers involved, they may exacerbate power imbalances — particularly if they engage in aggressive, adversarial behaviour. Confidentiality, while often necessary to get the parties to the negotiating table, is disadvantageous because it restricts the available information about the conciliation process and settlement outcomes, meaning later conciliation participants do not have access to information about outcomes which, for an unrepresented complainant, could put them in a disadvantaged position. Confidentiality also masks the extent to which discrimination remains a problem in society. Finally, anti-discrimination law relies on the individual for enforcement. Although some equality commissions can participate in litigation, they are principally concerned with complaint handling and conciliation.

**Research Method**

Empirical studies of discrimination complaints have focused on a ground or area of discrimination, the conciliation process or analysed the impact of a particular aspect of the law on discrimination complaints. The methods employed were: interviewing equality commission staff and parties to complaints; observing conciliations; examining complaint files; and examining the equality commissions’ complaint-handling methods. Some studies explored settlement

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29 Gonzalez and McCabe (2003), p 9 note that lawyers change ‘the dynamics’ of conciliation because they are used to operating in an adversarial model and this may create a hostile environment. Further, since they need to cover their costs, they may also be inclined to seek financial settlements. Similarly, Thornton (1989, p 756) says that lawyers, by nature and training, find it difficult to sit back and let the parties take control of the conciliation process.
30 Thornton (1989), p 740 says that without the protection of confidentiality, respondents would not be prepared to be labelled as wrongdoers and complainants may be deterred from lodging a complaint.
35 Charlesworth and Macdonald (2007) evaluated the impact of changes to federal industrial relations law; Gaze and Hunter (2008) examined the impact of the changes to the AHRC’s hearing function.
outcomes, but they did so by examining the equality commission's complaint files, which are not always comprehensive.\textsuperscript{41}

The empirical research presented in this article was collected as part of a larger study on the effectiveness of anti-discrimination laws,\textsuperscript{41} so data were collected about the full spectrum of the complaint-resolution process in Victoria. The parameters of this article are confined to: reporting the findings of the questions pertaining to the reasons why the vast majority of complaints settle prior to hearing; the outcome complainants seek; and what complaints are ultimately settled for. Some of the difficulties with defining and proving discrimination were identified above. In order to ascertain the degree to which the problems with proving discrimination are influencing settlement, barristers were asked about this.

This article does not deal with the VEOHRC's complaint-handling procedures, conciliation or hearings at the VCAT, except to the extent that the participants identified that these processes influence a party's decision to settle. The research method used was to obtain qualitative information from participants in the complaint-resolution process in Victoria through focus groups and interviews. The VEOHRC participated as an industry partner of the larger study. Its participation included allowing staff to participate in interviews and identifying lawyers and non-legal advocates who regularly represent parties at the VEOHRC and inviting them to participate. Members of three groups were interviewed: VEOHRC staff of various occupations, who are referred to collectively as 'VEOHRC staff' and by their occupation where relevant; solicitors and non-legal advocates who regularly represent parties to discrimination complaints at the VEOHRC; and barristers who are regularly briefed in discrimination cases. The latter two groups are referred to collectively as 'representatives', and by their occupation and the party they most often represent where relevant. The participants are summarised in Tables 2 and 3.

\begin{table}[h]
\centering
\caption{VEOHRC Staff}
\begin{tabular}{ll}
\textbf{Occupation} & \textbf{Total participants} \\
Commission member & 3 \\
Complaint handler & 7 \\
Investigator/conciliator & 9 \\
Manager & 4 \\
Legal staff & 4 \\
\textit{Total participants} & 27 \\
\end{tabular}
\end{table}

\textsuperscript{40} Thornton (1989); Thornthwaite (1993); Hunter and Leonard (1995); Devereux (1996); Chapman and Mason (1999).


\textsuperscript{42} ARC Linkage Project Grant (no. LP0455754) on 'Improving the Effectiveness of Australia's Anti-Discrimination Laws'.
Table 3: Representatives — Party Most Often Represented

<table>
<thead>
<tr>
<th>Party</th>
<th>Solicitors</th>
<th>Advocates</th>
<th>Barristers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant</td>
<td>6</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Respondent</td>
<td>8</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Both parties</td>
<td>14</td>
<td>3</td>
<td>7</td>
</tr>
</tbody>
</table>

It was not possible to interview parties to discrimination complaints. This was primarily due to restrictions in the confidentiality agreements the parties sign when they settle a complaint. It was the opinion of staff at the VEOHRC that this is drafted in such a way that it restricts the parties’ ability to discuss any aspect of the complaint, including anonymously.\textsuperscript{41}

The study has some limitations. First, the group of representatives interviewed was narrow. Not every discrimination representative in Victoria was invited to participate. The VEOHRC invited 32 representatives who regularly represent parties at the commission to participate. Two of those representatives and a barrister identified barristers who regularly represent parties in discrimination matters and had professional experience directly relevant to the research. Twenty-four barristers were invited to participate. Therefore, although their comments are illustrative, they cannot be considered representative of discrimination lawyers and non-legal advocates. Second, representatives deal with parties who have received some form of legal advice, so their comments about why parties settle and what they settle for must be read with this in mind. The views of the VEOHRC staff shed some light on why those without legal advice decide to settle. However, further direct research of parties is needed to form any meaningful conclusions about their motivations. Third, the interview questions were designed to explore the participants’ opinions and experience, so the data have no quantitative power. The purpose of the data is to provide qualitative evidence about settlement and outcomes. Fourth, it is acknowledged that one of the problems with relying on anecdotal evidence is that its accuracy cannot reliably be tested. For this reason, the interview data are supplemented by other available information about settlements in Victoria.

\textsuperscript{43} This was a problem in the past. Two decades ago, confidentiality clauses prevented Thornton from undertaking a full-scale empirical study of conciliation in anti-discrimination complaints in New South Wales, Victoria and South Australia: Thornton (1989), p 733, n 30. Two recent studies obtained information from parties to complaints, albeit for quite different purposes from this study. Charlesworth and Macdonald (2007) conducted interviews with female sex discrimination complainants, but their purpose was to identify the difficulties experienced by Victorian women workers before, during and after taking maternity leave and to identify whether the changes to the federal industrial relations law had exacerbated those difficulties. Gaze and Hunter (2008) interviewed parties to federal discrimination complaints, but the purpose of their study was to assess the impact of the new system for hearing federal discrimination complaints.
Why Do Parties Settle Before Hearing?

The majority of discrimination complaints are resolved at some point prior to hearing, either formally at conciliation or mediation, or informally through discussions between the parties and their representatives. This section explores the common reasons why parties decide to settle rather than pursue their complaint.

Psychological Reasons

In deciding whether to settle a complaint, according to a barrister, complainants consider the emotional and psychological toll of pursuing the complaint, particularly on those who are vulnerable: it may not be in their best interest to continue pursuing it or to embark on a trial. A complainant barrister said that complainants can be anxious about giving evidence about an unpleasant time in their life and the possibility of being extensively cross-examined. The time lag between the incident and the trial is also a consideration. By the time a complaint reaches the VCAT, it could be up to 12 months since the complaint was lodged. There will have been a long interval between the incident itself and the hearing date. By the time of mediation, representatives said, parties have moved on with their lives — for example, to a new job — while others are 'sick of it' and 'worn down' or they have 'cooled off' and are more agreeable to settlement offers.

Publicity

The publicity of a hearing was identified as a primary consideration for respondents. Conciliators thought that this was particularly so for employers. Two respondent representatives said that their clients settled to avoid what one termed the 'page three factor' — to avoid the details of the complaint being splashed 'all over page three of the Herald Sun'. Another respondent representative said that the media often distorted the facts and printed 'horrible stuff' about the parties concerned. Respondents also settle because they can insist on a confidentiality clause, which prevents the complainant from discussing the details of the complaint and the terms of settlement. Conciliators said respondents usually sought confidentiality clauses as a matter of course. One said respondents emphasised the importance of confidentiality during conciliation — particularly employers, who require a confidentiality clause to limit their liability against other potential complaints.

Financial Considerations

All representatives identified the cost of a hearing as a significant factor for both sides in deciding to settle. A union advocate said the union funded its members' representation at conciliation but could not fund them to go further because it was too expensive and there was the risk of costs. Complainant representatives said that their clients feared the consequences of not settling; if they ran the case and lost, they would have accrued costs and could be subject to a costs order, but even if they were successful, the tribunal may award them less in compensation than they
could have negotiated earlier. The VCAT’s compensation awards were described as being ‘out of step’ with what complainants can negotiate at settlement. For example, a complainant barrister had recently settled three complaints for compensation on par with the award in State of Victoria v McKenna, which was $125,000 in general damages. McKenna remains a high watermark for compensation awards in Victoria. During 2006–08, the VCAT awarded compensation in six of the eight complaints in which discrimination was proven. Although the awards ranged from to $2,000 to $83,368.83, the median compensation award was only $19,843.

By settling beforehand, the complainant receives some money that does not dissipate in legal fees. A complainant barrister said that they could give the complainant a definite cost for their fees up to the time of settlement, which may only be a couple of days of their time, whereas it is difficult to predict the cost of litigation. A respondent barrister said that after mediation the real costs start to accrue for preparing witness statements, outlining arguments and allowing for time spent in the hearing. The complainant also considers the inequality of their resources compared with the respondent’s. A complainant barrister recalled two complaints, both involving trials that ran for over four weeks. In each instance, the respondent was a state government department that spent over $1 million on the trial, including on expert witnesses, while the complainant’s barrister ‘begged’ experts to appear pro bono.

VEOHRC staff thought that, for many respondents, settling the complaint was a commercial decision. Some respondent representatives also identified this as a reason. They said that they advised their clients that settling was the best way to make the complaint ‘go away’. The commercial considerations that they identified were the cost of defending the complaint, both in terms of legal fees and the lost productivity of the staff who had to deal with it, and the time and energy involved in defending the complaint. However, representatives said that there were other respondents who were prepared to ‘call the complainant’s bluff’. They judge whether the complainant has the money to pursue the complaint and take the risk

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44 If the complainant is successful, the VCAT can still order the complainant to pay the respondent’s costs which were incurred after a settlement offer was made in writing that the complainant rejected, provided they received an order from the Tribunal that was less favourable than the respondent’s offer: Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 112.

45 State of Victoria v McKenna [1999] VSC 310. The award was to compensate the complainant for stress on her private and working life and pain and suffering: McKenna v State of Victoria [1998] VADT 83. It should be noted that sexual harassment was proven, as well as sex discrimination. Sexual harassment complaints typically receive higher compensation awards than discrimination complaints.


47 The complainant in Turner received the second highest compensation award during that period ($82,000). On appeal, this was reduced to $50,500: State of Victoria v Turner [2009] VSC 66.
that the complainant will not refer the complaint to VCAT, knowing that even if they do, they can settle at mediation.

Proof and Evidence
Complainant and respondent representatives acknowledged that even strong cases settle, not only those that may be unsuccessful at hearing. Respondents facing a complaint that will be costly to defend, such as those requiring a lengthy hearing, are advised to settle. A respondent representative said that they would advise their client to settle if the complainant was not represented and wanted to admit irrelevant material as evidence because the respondent would accrue costs disputing its relevance.

A complainant barrister said that the problems with being able to prove a case ‘are infinite’. Another complainant barrister described the process of putting together a case as ‘being able to really machete your way through’ all the issues to get to ‘the nub’ of what the complaint is actually about. A barrister said the definitions of discrimination are sometimes difficult to work with, particularly trying to fit the facts within the law and to frame the particulars accordingly. Several barristers said that they tended not to take a complaint to hearing unless it was significant, due to difficulties of proving it. A complainant barrister thought that discrimination had become more subtle and, unless the respondent was ‘stupid enough’ to send derogatory emails or say something in front of witnesses, it was difficult to prove what had actually happened. Another complainant barrister said that the reason most discrimination cases are hard to prove is because direct evidence is either not available or not accessible. They said establishing ‘causation’ in a direct discrimination complaint is problematic: they will have a client who was treated unfairly and the only reason the client can identify is an attribute, but the respondent will provide an explanation which seems valid. It is then difficult for the complainant’s barrister to prove that the actual reason for the behaviour was the attribute. Another problem is the unavailability of witnesses. A complainant barrister explained that, in an employment discrimination complaint, they may have to rely upon witnesses who are still employed by the respondent and are anxious about jeopardising their own position. A related problem is the disparity in the amount of evidence adduced by each side. A complainant barrister provided an example of a client who had one witness while the respondent had four, and in another case, the complainant was aged just 10 and was confronted by a respondent with 20 witnesses.

Consequences of Predominantly Settling Discrimination Complaints
Parties settle discrimination complaints to avoid the difficulties associated with litigation: cost, time, energy and publicity. A complicating factor is that this is not a jurisdiction where high compensation awards are common, so complainants may decide to settle earlier to avoid the expense of continuing. It is not possible to form

48 To establish direct discrimination, the complainant must show that the reason for the treatment was ‘on the basis of’ a prohibited attribute which they possess. See, for example, Equal Opportunity Act 1995 (Vic), s 7.
strong conclusions about the extent to which the difficulties of proving discrimination are a reason for settling. Representatives cited the absence of accessible evidence and the technical definitions as problematic — which supports the contentions made by other commentators about the difficulties with proving discrimination. It can be inferred that difficulties with proving discrimination are less likely to be a consideration for parties without legal advice.

The reasons for settling complaints cited above are common to other areas of law. What is unique to this jurisdiction is that the body of jurisprudence is underdeveloped. Anti-discrimination law has received little consideration from higher courts, so lower courts and tribunals have little guidance about how to apply and interpret the law. This, in turn, affects the complaint-resolution process: the equality commissions and lawyers have little authority for interpreting the law, meaning they are less certain about how the court would decide a complaint, while potential respondents and the wider community do not know what compliance requires. Therefore, pressures common to litigation are seen as having an undesirable effect on the development of anti-discrimination law because the lack of litigated cases is impeding its growth.

For these reasons, Fiss is against settlement. This is because, unlike litigation, he says settlement denies the court the opportunity to interpret the relevant statute:

To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone.

Fiss's concern is most apparent when considering the objective of anti-discrimination law: to address discrimination and promote equality of opportunity. There is no scope to discuss these concepts in detail, but if equality of opportunity is taken at its broadest, then the law's objective is social change. Certainly there are commentators who are sceptical about how effectively the law — and, by extension, the courts — can change social structures, but it can be concluded that if the legislature intended anti-discrimination law to have broader, remedial effect, then the fact that there are few publicly decided cases each year is detrimental to that objective. This problem is exacerbated by the confidentiality of the conciliation process and individualised settlements. The final section of this article comments further on this.

50 The High Court has substantively considered anti-discrimination law on only seven occasions.
52 It is an objective of the laws in Victoria, the ACT, Queensland, the Northern Territory and Western Australia.
53 See, for example, Lustgarten (1986); Bell (1992).
What Do Complainants Want?

This section presents data about what complainants initially seek when they make a complaint, compared with what they ultimately settle for. This is compared with settlement data from other research conducted in Victoria.

Outcomes Complainants Seek

Complaint handlers said that when a complainant approaches the VEOHRC about making a complaint, often they have not identified what they want from the process. A complaint handler said that during the initial stages the complainant is emotional—which makes it difficult for them to identify a tangible outcome. They said complainants wished that the conduct had not happened but do not know how to remedy it. A complaint handler spoke of complainants who expect staff to tell them what they should ask for, based on what those in similar situations have negotiated previously. Rather than advising them, complaint handlers said that they suggested what outcomes the complainant could consider. They concurred that the most common suggestions they made were equal opportunity training, a reference (termed a ‘statement of service’) and an apology. If there are lost wages to be compensated, they suggest financial compensation.

Non-Financial Outcomes

Representatives said that for many complainants, talking about their experience, bringing it to the respondent’s attention and having what a respondent representative described as a ‘cathartic experience’ are sufficient to remedy the discrimination. For others, it is about ‘the principle’, and representatives find this much more difficult to remedy because respondents are often reluctant to admit they were wrong. Therefore, remedying the principle tends to mean seeking compensation because, as many representatives acknowledged, that is how the law remedies a wrong. As a respondent representative said, ‘principles are really expensive things’.

Other representatives attempt to be creative in what they negotiate. A complainant barrister thought it was important to find ‘the keys’ for each complainant—which are not always financial. By doing this, they said, compensation is not always an issue because they have found alternate ways to remedy the wrong. A complainant representative said they are creative in the outcome they negotiate. They try to find an appropriate way of acknowledging the experience for each individual complainant. This may include money in a different form, such as a laptop or a week’s paid holiday. A respondent representative said they had negotiated career counselling services as part of a settlement to help the complainant find another job.

Compensation

Complaint handlers said complainants were reluctant, and sometimes embarrassed, to talk about compensation at first, and the dollar figure they place on the complaint
can be unrealistic. Representatives agreed that complainants seek large amounts of compensation initially. For example, a respondent representative recalled a complainant who sought $27,000 from a local council, but the respondent thought the complaint was only worth $5,000. The complaint settled at mediation for $8,000.

A complainant barrister said the amount of compensation the complainant seeks sometimes reflects their need for acknowledgment; a higher amount is a higher degree of acknowledgment, whereas a lower amount is seen as an insult. A complainant representative said that unless there is a monetary component to the settlement, the respondent does not take the matter seriously. In assessing an appropriate amount of compensation to seek, they determine the respondent's 'pain factor' — a dollar amount that the respondent will feel — which varies according to the respondent employer's size and financial situation.

**Wider Outcomes**

Representatives and VEOHRC staff referred to some instances of complainants seeking remedies which benefitted other people, and said that this depended on the type of complaint. For example, for complaints relating to goods and services or accommodation, complainants usually want something fixed — such as access to a building — so that others do not have to experience what they did. A representative from a disability advocacy group, who often represents complainants, said that they include specialised training programs in settlements — for example, disability awareness training or training from a relevant provider, such as the MS Society if the complainant suffers from multiple sclerosis. Employment complaints are different. Few complainants who have left their job will seek reinstatement, primarily because the relationship has broken down, so compensation is the only useful remedy. Those who are still employed may seek an arrangement for the relationship going forward, such as changing a roster or work hours. However, this is usually converted to compensation because that is 'easier' for employers to agree to, compared with having to address the underlying problem.

**Settlement**

The information about settlement outcomes presented thus far suggests that compensation is the predominant outcome sought because it is the primary way the law can redress the complainant's experience. The exception is complaints about disability access, where a change in practice is usually sought. This section explores what parties settle for by comparing other available settlement data to the qualitative information obtained in this study.

**VEOHRC Settlement Information**

In her study of sex and gender employment discrimination complaints lodged at the VEOHRC in the first three months of 2004, Charlesworth found that, in 17 of the 22 complaints in the sample that settled, the settlement involved financial

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54 A number of complaints handlers and representatives said that complainants expected equivalent sums to what they had seen on American television programs.
compensation. The median settlement was $3,000. Five settlements involved an apology, and in six the respondent agreed to provide or renew equal opportunity education and training.\textsuperscript{55}

Conciliation settlements negotiated at the VEOHRC during 2006–07 were published by the government,\textsuperscript{6} as reproduced in Table 4.

**Table 4: VEOHRC Conciliation Outcomes, 2006–07**

<table>
<thead>
<tr>
<th>Outcome</th>
<th>No. of settlements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Money (total $455,923)</td>
<td>47</td>
</tr>
<tr>
<td>Resolved</td>
<td>20</td>
</tr>
<tr>
<td>Money/apology</td>
<td>7</td>
</tr>
<tr>
<td>Apology</td>
<td>4</td>
</tr>
<tr>
<td>Money/statement of service</td>
<td>3</td>
</tr>
<tr>
<td>Apology/counselling</td>
<td>2</td>
</tr>
<tr>
<td>Money/apology/reinstated</td>
<td>2</td>
</tr>
<tr>
<td>Apology/statement of service</td>
<td>1</td>
</tr>
<tr>
<td>Policy change/money discount</td>
<td>1</td>
</tr>
<tr>
<td>Statement of service</td>
<td>1</td>
</tr>
<tr>
<td>Money/working group established</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>89</td>
</tr>
</tbody>
</table>

Over 67 per cent of the settlements in Table 4 included compensation. The average compensation settlement was $9,700.49. Almost 18 per cent included an apology as part of the settlement. Equal opportunity training does not feature in this sample of outcomes, and only five settlements included a statement of service. There is no available information about the type of complaints to which these settlements related.

Compensation is the predominant feature of settlements in both sets of data. Apologies featured in 29 per cent of Charlesworth’s sample and 18 per cent of the VEOHRC’s data. The frequency of apologies in these settlements contrasts with the experience of representatives, as discussed below. This data also suggests that, recently, training has not featured in settlements. Thirty-five per cent of settlements in Charlesworth’s sample included equal opportunity education and training, but training did not feature in the VEOHRC’s settlement data about complaints settled three years later.

**Apologies**

Complainants seek apologies, according to a complainant representative, in 99.9 per cent of complaints. However, a genuine apology is rarely given. According to a complainant barrister, those who get an apology get one that does not have real ‘teeth’ once it has been ‘legalled’. Another complainant barrister said that most apologies ‘are not worth the paper they’re written on’. Complainants receive what

\textsuperscript{55} Charlesworth (2008), p 17.

\textsuperscript{56} Department of Justice (Victoria) (2007), p 12.
two representatives termed ‘the EO apology’ — the respondent apologises for upsetting the complainant but does not admit liability. A complainant representative said that discouraged their clients from pursuing what they considered would ultimately be a forced apology. A respondent representative recalled an unusual instance when a respondent apologised voluntarily.

Compensation

Several conciliators said that, by the time of conciliation, many complainants will have abandoned the non-monetary outcomes. They said conciliation can still fail for other reasons, but it will not fail because the respondent has not agreed to training or an apology. A conciliator said during the process the outcome sought tends to ‘drift into compensation’. A representative described it as ‘defaulting to compensation’. They said the non-economic components of the settlement are converted to a dollar amount, or they are discarded. A conciliator said that most of the conciliation time is spent coming up with an acceptable dollar figure. The majority of conciliators and representatives agreed that money was the ‘sticking point’ at conciliation and that very few complaints settle without money changing hands. A respondent representative said that ‘everything else goes away if the money’s right’.

Conciliators said that if the complainant has a lawyer, there will be a financial component to their settlement so that the complainant can pay their legal fees. Similarly, a respondent representative said that the amount of compensation increases as the complainant’s costs increase. By the time the complaint undergoes mediation at the VCAT, at a minimum the complainant will have accrued costs for the directions hearing and drafting particulars and witness statements. A complainant representative said their fees would be approximately $3,000–$5,000 by the time of mediation, but for other representatives their fees could be $10,000.

Settlements and the Dominance of Compensation

One of the benefits of ADR compared with litigation is that a variety of outcomes can be negotiated which may not be available to a court. The above discussion suggests that this is not occurring. Although complainants begin by seeking wider remedies, which are not always financial, the settlement outcome defaults to compensation. The available data from the VEOHRC support this assertion. Moreover, other studies have found a similar trend. Chapman and Mason examined discrimination and vilification complaints lodged by women on the basis of homosexuality in New South Wales. Of the nine that settled, financial compensation featured in six of the settlements and the median compensation award was $4,000. The next most common outcomes were a change in policy/practice and an apology, which featured in four settlements.57 Hunter and Leonard examined 76 sex discrimination complaints that settled in South Australia, Victoria and federally. An apology was the most frequent term of settlement, but this was very closely

57 Complaints may have been settled with more than one of the listed outcomes: Chapman and Mason (1999), pp 560–61.
followed by changes in policy and financial compensation.\textsuperscript{58} The current study suggests that compensation is prevalent because in many instances it is the only way to remedy the complainant's experience. Most complaints relate to employment.\textsuperscript{59} Reinstatement may be inappropriate and the complainant may need to recover lost wages.

Without statistical data from the VEOHRC and VCAT, it is not possible to draw conclusions about the amount of compensation for which complaints settle.\textsuperscript{60} From the VEOHRC's published settlement data, it is only possible to determine the average compensation settlement, which was $9,700.49.\textsuperscript{61} In Charlesworth's study, compensation ranged from $48 to $20,000. More than nine awards were for $3,000 or less.\textsuperscript{62} The data from legal representatives suggest that, due to the disparity between settlements and court orders, complainants have little incentive to pursue the complaint to hearing. The settlement data Charlesworth obtained revealed a median compensation award of $3,000 for sex and gender complaints in employment.\textsuperscript{63} The median compensation award at VCAT during 2006-08 was $19,843.\textsuperscript{64} This does not reveal a disparity, although it is far from conclusive given that Charlesworth's data were limited to sex and gender complaints over a three-month period. Without additional data, it is not possible to determine conclusively the disparity between compensation settlements and VCAT awards. What can be concluded is that by settling, the complainant avoids the costs associated with litigation, which they may otherwise have to deduct from their compensation award.\textsuperscript{65}

\section*{Options for Improvement}

This study has illuminated two aspects of settling discrimination complaints: the disadvantages of litigation are having an undesirable effect on the development of anti-discrimination law by encouraging parties to settle; and, in general, complaints are settled with individualised remedies. Many of the findings in this study are consistent with earlier studies. The reason for this is that, structurally, anti-discrimination laws remain much the same today as when they were introduced up to 30 years ago, even though there are problems. Furthermore, the individual

\textsuperscript{58} Their frequency in settlements was 30.5 per cent, 29.8 per cent and 29.4 per cent respectively: Hunter and Leonard (1995), p 18.

\textsuperscript{59} 1,128 of the complaints received by the VEOHRC in 2006-07 related to employment: VEOHRC (2006-07), p 36.

\textsuperscript{60} The VEOHRC was not able to supply these data during the research project: email from Chris Thwaites, VEOHRC, to Dominique Allen, 26 September 2008.

\textsuperscript{61} Table 4.

\textsuperscript{62} Charlesworth (2008), p 17.

\textsuperscript{63} Charlesworth (2008), p 17.

\textsuperscript{64} See note 47.

\textsuperscript{65} VCAT is empowered to award costs (Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 109), but of the eight successful discrimination cases during 2006-08, it awarded the complainant costs in only one: Mangan v Melbourne Cricket Club [2006] VCAT 73.
enforcement model itself is limited in how effectively it can tackle disadvantage. The purpose of the final part of the article is to canvass some options for addressing these problems based on recent inquiries and models operating in other countries.\(^6\)

Previously, it was illustrated that there is little publicly available information about settlements in most jurisdictions and none in Victoria. This is a problem for future complainants and the wider community. A simple way to improve this is to increase the amount of information available about settlements.\(^7\) Comparably, more information is available to complainants in other countries. For example, the Irish Equality Tribunal publishes a de-identified annual review of significant and novel aspects of mediation settlements.\(^8\) It also publishes an annual review of cases, highlighting those that interpreted fundamental legal concepts.\(^9\)

There are also problems with the enforcement model: it is privatised, which masks the extent to which discrimination exists and does not deter would-be discriminators, and discrimination is predominantly resolved with individualised remedies, usually compensation, which does not address wider discrimination by requiring the respondent to take action. The equality commission is not active in enforcement: its primary concerns are complaints handling and conciliation. An alternative approach is to offer complainants direct access to court with optional conciliation. This is the model in Britain and Northern Ireland,\(^10\) and it was recently recommended for Victoria.\(^11\) In these countries, conciliation is separate from the equality commission, so the equality commission can advise and assist complainants and engage in strategic enforcement of anti-discrimination law.\(^12\) There is not scope here to examine these jurisdictions further,\(^13\) only to identify some of the benefits of changing the process. Primarily, it is flexible — complainants who want their ‘day in court’ could start proceedings without delay, while those who want to resolve their complaint quickly and informally could attempt conciliation. Through assisting complainants, the equality commission could develop the law and negotiate wider remedies, like its overseas counterparts. Giving the equality commission a strong enforcement role also signifies that the state considers addressing discrimination to be in the public’s interest.\(^14\) Smith recommends more extensive changes. She proposes changing the regulatory model

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\(^6\) For detailed analysis of these measures, see Allen (2009b). Comparative studies of enforcement include Hepple et al (2000); O’Cinneide (2002); Sternlight (2004).

\(^7\) The Department of Justice (Victoria) (2008) recommended that both the VEOHRC and VCAT disseminate de-identified settlement information: Recommendations 29 and 33.

\(^8\) See, for example, Equality Tribunal (2007a).

\(^9\) See, for example, Equality Tribunal (2007b).

\(^10\) Although conciliation is only available for employment related complaints and non-employment disability complaints in Britain and Northern Ireland.

\(^11\) Department of Justice (Victoria) (2008), Recommendation 24.

\(^12\) None of the recent inquiries have considered changing the enforcement model, although the Senate recommended a separate inquiry into this issue: Senate Legislative and General Purpose Standing Committee (2008); Recommendation 43.

\(^13\) On the enforcement work of the British equality commissions, see O’Brien (2005); Barnard (1995).

\(^14\) Dickens (2007), p 475.
so that the equality commission better reflects other regulators, such as occupational health and safety regulators. Most significantly, she proposes arming the equality commission with stronger enforcement powers and empowering it to pursue a range of escalating orders against a non-compliant respondent. Whether the equality commission engages in strategic enforcement by assisting complaints or assumes a regulatory role, the onus of addressing discrimination would no longer rest solely on the individual. These proposals require further consideration if the law’s effectiveness is to be improved.

The problems discussed in this article also highlight three characteristics of the individual enforcement model: it is passive, retrospective and reactive. The law does not pre-empt discriminatory behaviour; rather, it offers a resolution after the fact, and there is no obligation for employers or service providers to take anticipatory action to address policies or practices that could disadvantage certain groups. Of this model, O’Cinneide says it ‘relies excessively on an approach that resembles sending a fire engine to fight a fire rather than preventing that fire in the first place’.

Reforming Australia’s anti-discrimination law in the ways suggested above will not dramatically reconceptualise the existing system. It will remain reactive rather than proactive, negative rather than positive, and still fit O’Cinneide’s description. Positive duties to promote equality were introduced in Britain and Northern Ireland to overcome these limitations, and they are presently under consideration in Australia. Positive duties require public authorities to have due regard to promoting equality of opportunity in carrying out their functions. An individual victim is not required to take action; the duty attaches to the actions of public authorities regardless, forcing them to promote equality in their decision-making and policies.

These criticisms of the individual enforcement model do not imply that there is no role for individual complaints in addressing discrimination; it is necessary to provide a mechanism for individual victims to resolve their complaint and obtain redress. Indeed, the United Kingdom retained the individual complaints system; positive duties operate concurrently. However, it must be acknowledged that individual complaints are capable of having minimal effect on eradicating discrimination in society.

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75 Smith (2006), p 723ff. See also the enforcement pyramid in Hepple et al (2000), Ch 3.
77 There is a wealth of commentary and evaluative material on positive duties. See, for example, Fredman (2001, 2005); O’Cinneide (2005).
78 The West Australian Equal Opportunity Commission (2007), p 10 proposed imposing a gender equality duty on public employers. The Department of Justice (Victoria) (2008) recommended introducing a duty to eliminate discrimination: Recommendation 9. The Senate Legislative and General Purpose Standing Committee (2008) recommended that further consideration be given to introducing a positive duty on public sector organisation, employers, educational institutions and other service providers: Recommendation 40.
79 See, for example, Northern Ireland Act 1998 (UK), s 75.
Conclusion

Parties settle discrimination complaints for valid reasons that also apply in other areas of law, such as the time and energy it takes to pursue or defend a complaint, and the publicity associated with litigation. Representatives revealed that they advised complainants to settle due to the risk of a lower compensation award if they were successful compared with what they could negotiate prior to hearing. It is also clear from this discussion that, although complainants consider a range of outcomes such as equal opportunity training and apologies, complaints are predominantly settled with compensation. The development of anti-discrimination law has stagnated, even though — as this article shows — there are options available for improving its effectiveness. It is for this reason that the findings of this study are consistent with those of earlier studies. To change this, it is necessary to address persistent problems with the law and implement a proactive approach to equality that supplements the individual enforcement model.

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*State of Victoria v Turner* [2009] VSC 66
*Turner v State of Victoria* [2008] VCAT 161

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