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Owen Fiss, ADR and Australian Discrimination Law

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ABSTRACT

In his celebrated article, Against Settlement, Owen Fiss objected to settlement for, among other things, securing the peace while not necessarily delivering justice and denying the court the opportunity to interpret the law. Fiss sees settlement as a technique for streamlining court dockets, the civil equivalent of plea bargaining. This article explores Fiss’s criticisms through the lens of resolving discrimination complaints in Australia. It argues that although it is valuable to offer complainants a system for resolving complaints quickly and informally, especially in a jurisdiction in which complainants are often from marginalised groups, it is also necessary to recognise that this system is limited in how effectively it can develop the law and, by extension, eradicate discrimination. In essence, the system’s operation epitomises Fiss’ opposition to settlement. Modifying the complaint resolution system would improve this situation. The article concludes by proposing three reforms based on mechanisms used in comparable countries: introducing direct access to the court or tribunal; strengthening ADR by making it voluntary and incorporating a ‘rights-based’ approach; and encouraging the regular publication of specific information about settlements and significant cases.

INTRODUCTION

In his seminal article in 1984, Owen Fiss explained why he is against settlement:

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, 1984: 1085)

This article contends that Fiss’s concern has been realised in the development of anti-discrimination law in Australia. The process of resolving a discrimination complaint is as follows: a victim of discrimination is required to lodge a complaint at the statutory Equality Commission1 in their jurisdiction. If the Commission accepts the complaint, it will attempt to settle it, usually through a confidential conciliation process. If that is unsuccessful, the complainant may then ask the Equality Commission to
refer the complaint to court for adjudication. The complaint may then undergo court ordered mediation, which is also confidential, adding another layer of secrecy to the process. Each year, very few discrimination cases reach the stage of a final hearing; the overwhelming majority are settled or withdrawn prior to hearing. The result is that although Australian law has prohibited discrimination for over 30 years, the body of case law remains small. Due to the confidential nature of the complaint resolution process, other victims are limited in their ability to exercise their rights.

After considering the process of resolving discrimination complaints in Australia, Part I explores the benefits and drawbacks of using Alternative Dispute Resolution (“ADR”) in this setting. It argues that although it is valuable to offer parties a system to resolve the complaint quickly and cost-effectively, especially in an area in which complainants are often the most vulnerable members of society, it is also necessary to recognise that this system is limited in facilitating legal development and, by extension, eradicating discrimination. As Part II explores, in essence, the system’s operation epitomises Fiss’s opposition to settlement. It is not suggested that parties to discrimination complaints should not be given the opportunity to resolve their complaint outside of a court hearing. The central thesis of this article is that the system typifies Fiss’s concerns about settlement and for that reason, it should be modified. ADR is incorporated in the revisions that this article proposes.

Introducing small changes to the enforcement model would improve the situation. Part III considers mechanisms used in the United States of America, Britain, Northern Ireland and Ireland which would overcome the identified limitations with the Australian model. It explores the benefits of giving complainants direct access to courts and making ADR voluntary; the utility of changing the dispute resolution model so that it is less focused on facilitating a settlement and more ‘rights-based’ and focused on upholding both the victim’s rights and the legislation’s objectives; and the advantages of requiring the Equality Commissions to publish more information about settlements, thereby empowering future complainants and deterring would-be respondents. This analysis also draws on interviews conducted with scholars, lawyers and staff at the Equality Commissions in those countries.

I – USING ADR TO SETTLE DISCRIMINATION COMPLAINTS IN AUSTRALIA

The Process of Resolving a Discrimination Complaint

In Australia, discrimination is prohibited by federal law and by laws in each State and Territory on a range of attributes, such as race, sex and
disability, and in various areas such as employment, education and goods and services. Discrimination complaints are resolved in much the same way in each jurisdiction. A person who has experienced unlawful discrimination can lodge a complaint at the statutory Equality Commission in their state or territory or at the federal Australian Human Rights Commission (“AHRC”). The Equality Commission investigates the complaint and attempts to settle it, usually through conciliation. Most Acts do not define ‘conciliation’, apart from stating that it will be conducted in a manner that the person presiding over it sees fit. The exception is the Australian Capital Territory’s legislation which states:

conciliation of a complaint involves the commission acting as an impartial third party to help the parties to the conciliation to endeavour to resolve the matters raised by the complaint.5

Similarly, the National Alternative Dispute Resolution Advisory Council defines ‘conciliation’ as:

a process in which the participants, with the assistance of the dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement.6

The AHRC’s approach fits with this definition. According to its website, conciliation is informal and flexible.7 The role of the Conciliator is to help “both sides talk about the issues in the complaint and makes sure that the process is as fair as possible for everyone involved.”8 Conciliators are impartial and do not provide legal advice. Their role is to “assist the parties to consider different options to resolve the complaint and provide information about possible terms of settlement.”9 Ronalds says that the nature of conciliation varies between complaints. Conciliation may involve a face-to-face meeting between the parties. In other instances, the parties may be in different rooms and the Conciliator will move between the two groups to convey offers and counter offers. Sometimes geographical locations may prevent the parties from meeting, so the conciliation may be conducted by phone or through an exchange of letters (2008: 178).10

The only legislative requirements for the conduct of conciliation are that it is held in private11 and evidence of anything said during the conciliation is not admissible in court proceedings.12 Most legislation permits the parties to be represented,13 although some require the party to seek leave prior to the conciliation.14 The Equality Commissions also publish information about the conciliation process on their websites to help the parties to prepare.15 However, the Equality Commissions do not publish the facts or outcomes of the complaints that are resolved at this stage, even in a de-identified form. Some publish examples of settlements on their websites or in their annual reports (Allen, 2009: 781) but generally,
the Equality Commissions are reluctant to disclose such information, even for research purposes.\textsuperscript{16}

If the parties do not settle through conciliation, the complainant can ask the Equality Commission to refer the complaint to the tribunal. The complaint may be subject to mediation\textsuperscript{17} before proceeding to a full hearing before a civil tribunal or the Federal Court. There are two differences between conciliation by the Equality Commission and mediation by the court or tribunal. First, mediation occurs as part of the court’s case management procedures to reduce its workload so the purpose is to avoid a hearing. By contrast, Gonzalez and McCabe identify that the challenge for Conciliators in the anti-discrimination context is to tailor their approach to maximise the chances of reaching a resolution while also ensuring that the conciliation meets the parties’ needs (2003: 4). The second difference is that the Mediator may be a member of the court or tribunal,\textsuperscript{18} so they are experienced at deciding complaints and may use that experience to guide the parties towards a resolution. Conciliators are employed by the Equality Commission and tend to take a ‘hands-off’ approach and facilitate discussion between the parties, although they also bring expertise to the process through their knowledge of the law and their experience conciliating past complaints (Ball and Raymond).

All discrimination complaints are dealt with via a single process, regardless of their urgency or the nature of the discriminatory conduct.\textsuperscript{19} The system assumes that all complaints are the same and that all of the parties are in the same situation, so it compels them to participate in settlement negotiations. The result of this process is that very few complaints reach the courts each year; the vast majority are settled, withdrawn or struck out on procedural grounds. Table 1 demonstrates this in three jurisdictions: Victoria, Queensland and federally.

Table 1  Complaint Resolution 2006–2007\textsuperscript{20}

<table>
<thead>
<tr>
<th>Complaint Resolution 2006–2007</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\textsuperscript{21}</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\textsuperscript{22}</td>
</tr>
<tr>
<td>Complaints Resolved through Mediation at the Tribunal/Court</td>
<td>65%</td>
<td>57%</td>
<td>Unknown\textsuperscript{21}</td>
</tr>
</tbody>
</table>
Advantages and Disadvantages of Using ADR to Settle Discrimination Complaints

Before considering why Fiss is opposed to settlement generally, it is worth outlining some of the advantages and disadvantages of using ADR to resolve a discrimination complaint. The first advantage of ADR is that it is less intimidating than a court proceeding, which demands, amongst other formalities, technical hearing and evidential procedures. By contrast, ADR is suitable for those people who would not pursue a complaint if they had to participate in a public hearing, perhaps due to the emotional stress of a trial or their unfamiliarity with court procedures. This is an important consideration here because discrimination complainants are likely to be vulnerable or from marginalised groups. A complainant will be more inclined to obtain legal representation for a court hearing than for ADR. Thus, the second advantage of ADR is that it increases access to justice. In the anti-discrimination sphere, ADR is cost-free, unless parties choose to retain legal representation, and even so, representation is less expensive than for litigation. Third, ADR is quicker and more expeditious than litigation. For example, in Victoria, once the Equality Commission accepts a complaint, it has 60 days to attempt to conciliate it. Finally, ADR is more flexible than litigation. The parties control the outcome, rather having an outcome imposed by a third party. There are no restrictions on the settlement the parties can agree to. At least theoretically, the parties determine the terms of settlement.

Just as there are advantages to using ADR, there are also disadvantages. ADR may reinforce the power imbalances between the parties to the complainant’s detriment (Hunter and Leonard, 1997: 1, n3). The Conciliator, as an impartial third party to the process, is expected to address any power imbalances. There is an increased possibility of power imbalances in a discrimination complaint because the complainant may from a marginalised group. If the parties are in an ongoing relationship, such as in an employment related complaint, this may also create a power imbalance because the complainant may not want to jeopardise that relationship during conciliation. The power imbalance is also evident when considering the inequality in access to legal advice. Complainants are usually not eligible for Legal Aid (Gaze and Hunter, 2009: 716–718) and the Equality Commission cannot advise or assist either party to resolve their complaint. While most respondents have representation, in 2008–2009, only 35% of complainants in federal discrimination matters had some form of representation (Australian Human Rights Commission, 2008–09: 63). The dynamics of ADR can change if lawyers are involved. Lawyers may exacerbate existing power imbalances, particularly if they engage in aggressive, adversarial behaviour, which is contrary to the purpose of an informal resolution process. The focus of ADR may then shift to arguing the
merits of the complaint, rather than allowing the parties to reach a mutual understanding and negotiate a suitable outcome. In that context, the role of the Conciliator is important because they can minimise the degree to which the process becomes adversarial and encourage the parties to take ownership of the outcome, rather than letting the process develop into a negotiation between the lawyers.

The second disadvantage of ADR is confidentiality. A confidentiality term is commonly a feature of a settlement agreement in a discrimination complaint. Ronalds states that this term can be as narrow as the parties agreeing to keep the terms of settlement private or much wider and prevent the parties from disclosing that a complaint was made and the settlement terms (2008: 193). Legislation also requires the conciliation process to be kept confidential. The purpose of confidentiality in this sense is so that public scrutiny does not obstruct the possibility of a successful conciliation (Thornton, 1989: 740). Thornton says that without the protection of confidentiality, respondents would not be prepared to be labeled as wrongdoers and complainants may be deterred from lodging a complaint (1989: 740). The problem with confidentiality is that it restricts the publicly available information about the conciliation process and settlement outcomes and, in doing so, it masks the extent to which discrimination remains a problem in society. Confidentiality also means that later conciliation participants do not have access to information about the process and possible settlement outcomes which, particularly for an unrepresented complainant, could put them in a disadvantaged position. Thornton says that confidentiality contributes to the idea that settlement outcomes are relevant to the parties only, meaning they cannot be used as models for others, nor can the complaint be used by groups to lobby for changes to policy (1989: 741). Thus, confidentiality is substantially limiting the law’s ‘ripple’ effect.

Third, there is no guarantee that ADR protects the public’s interest in eliminating discrimination or that it protects individual rights. This is more problematic if ADR is used purely as a case management technique. The purpose of mediation at the court or tribunal is to avoid a hearing. Although conciliation at the Equality Commission has a slightly different purpose, Hunter and Leonard say that it may not protect the public’s or the individual’s interest if the Equality Commission perceives the goal of conciliation to be resolving the complaint quickly and keeping it away from the courts (1995: 1). At least one Australian Equality Commission has admitted that this is its intention. The Queensland Anti-Discrimination Commission noted that in 2006–2007, more complaints were resolved at the Commission, meaning less were referred to the tribunal for hearing, a trend that it intended to maintain (2006/07: 11).
II – FISS’S OPPOSITION TO SETTLEMENT

Fiss published *Against Settlement* at a time when there was a growing movement away from litigation towards using other forms of resolution to settle legal disputes. ADR was intended to reduce the amount of litigation that was commenced and to resolve ongoing litigation. Fiss was concerned about the way advocates of ADR characterised adjudication. He thought that they viewed it as a process for resolving disputes between neighbours but failed to recognise that the fact that the neighbours’ relationship has disintegrated in such a way that they have to turn to a third person to resolve their dispute suggests that they will not be able to reach a negotiated agreement by themselves (1984: 1075).

Fiss put forward four objections to settlement. First, settlement assumes the economic and resource equality of the parties; it envisages the parties as neighbours of roughly equal standing. This is rarely the case and so the parties’ resource inequality directly influences the negotiation process (1984: 1076–1077). Second, the settlement model assumes that the parties are individuals but they are regularly corporations with responsibilities to shareholders, and organisations or groups. In the latter instance, it is unclear who can speak for or give consent on behalf of the institution (1984: 1078–1082). Third, the model assumes that settlement is the end of the story. It overlooks the fact that a court judgement may be the beginning of a longer process and the court’s role can continue indefinitely (1984: 1082–1085). Fiss’s final objection to settlement is that it may secure the peace but it will not necessarily deliver justice. Fiss sees settlement as a technique for streamlining court dockets, describing it as the civil equivalent of plea bargaining (1984: 1075). For Fiss, the purpose of adjudication is broader than two neighbours turning to the court to resolve their dispute. It is to achieve justice, which is a public good that extends beyond the satisfaction of the parties (2009: 1277). He states that the job of courts is:

To explicate and give force to the values embodied in the authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them (1984: 1085).

Settlement denies the court the opportunity to interpret the law. For instance, Fiss says, settling a school desegregation suit may settle the peace between the parties but it will not deliver racial equality (1984: 1085). Although Fiss does not discuss this, his argument leaves us to contemplate whether racial integration would have spread beyond Topeka, Kansas in 1954 if the Supreme Court was denied the opportunity to rule in *Brown v. Board of Education of Topeka* 347 US 483 (1954). It is necessary to explore Fiss’s last criticism in more detail and to show how it has transpired in the context of Australian anti-discrimination law.
Peace but not Justice

Fiss is critical of settlement because while it may secure the peace between the parties, it will not necessarily deliver justice. This idea can be considered first in terms of whether justice is achieved between the individual parties who settle a discrimination complaint. The complainant may be inclined to settle due to a range of factors, including that they are happy with the offer made by the respondent and believe that justice has been done. However, their reasons for settling may not be that simple. The parties may settle because of the time and energy it takes to pursue or defend a complaint, the publicity associated with litigation and the cost. In Australia, complainants in discrimination matters also risk a lower compensation award if they are successful compared to what they could negotiate at settlement (Allen, 2009: 786–787). So complainants may not necessarily get justice; they may just get tired of the dispute.

It is necessary to recall the key limitation in analysing settlement outcomes in discrimination complaints – very little data is available about the nature of complaints and the outcomes negotiated, especially in comparison to other countries (Allen, 2010a). Although the available data is limited, it does show that most settlements include individualised remedies, such as compensation, an apology or a reference. Of these, compensation is by far the most common (Allen, 2009: 790–794). For example, in 2006–07 in Victoria, compensation was included in more than 67 percent of settlement agreements (Allen, 2009: Table 4). A discrimination settlement is a contractual agreement between the parties. If it is negotiated during conciliation, the Equality Commission may keep a copy on file but they rarely release information about how complaints are settled either in their annual reports or for research purposes. Consequently, we cannot evaluate whether settlements are upholding the complainant’s rights.

Another approach for considering whether justice is achieved is in the context of the wider community, namely whether the law has achieved its objectives. The purpose of anti-discrimination law is to address discrimination and promote equality of opportunity. This is achieved by prohibiting a range of conduct and establishing a system by which victims of unlawful conduct can lodge complaints and obtain redress. The Equality Commission is charged with educating the community about their rights and of the consequences of discriminating. If ‘equality of opportunity’ is taken at its broadest, then the law’s objective is social change. While it is acknowledged that this system is a relatively weak method of achieving social change, the privatised conciliation process and the confidentiality of settlement outcomes compromise it even more. This is exacerbated by the fact that there are few publicly decided cases each year, as the next section shows. Thus
far, the law cannot be considered to be delivering justice to the wider community.

**Limited Opportunities for Courts to Interpret the Law**

Fiss is critical of settlement because it means that the court is denied the opportunity to interpret the law and bring reality into line with what the law requires. Similarly, Sternlight comments that because anti-discrimination law is a complex area of law and cases often involve confusing and contested facts, society needs correct determinations. She states that society needs “clear and public precedents to deter future wrongdoers and let persons know what conduct is permissible” (2004: 1477–1478). Recall that in Australia the vast majority of complaints are settled through confidential conciliation. Of those referred to the court, most are withdrawn or settled prior to hearing. For instance, in 2007, the federal courts only heard twelve discrimination cases, the Queensland Anti-Discrimination Tribunal heard nine and the Victorian Civil and Administrative Tribunal heard eleven. Only five of these 32 decisions were successful, so the courts had few opportunities to interpret discrimination law. Therefore, the most dramatic way that Australian anti-discrimination law depicts Fiss’s concerns is the lack of jurisprudence that has developed in the 30 years since discrimination was first prohibited in Australia. The High Court has substantively considered anti-discrimination law on only seven occasions and this has not resulted in a clear body of case law to guide lower courts and tribunals. Most of the High Court’s decisions relate to disability discrimination, only one relates to race discrimination, the Court has never considered age discrimination and there is only one authoritative decision about the application of special measures. A coherent body of jurisprudence from superior courts in the States and Territories has not filled the gap in jurisprudence either.

The limited amount of jurisprudence is a considerable problem for society in general. Anti-discrimination law did not develop from a rich common law base. It is a relatively new area of law that is statute based. For its growth and development, the courts are required to render interpretations. Furthermore, court decisions show that discrimination still exists and that it has consequences. With so few cases coming before the courts, the Australian community could be forgiven for thinking that discrimination is no longer a problem. The law’s limited development is also a problem for those involved in resolving individual complaints. Staff at the Equality Commissions, who provide information and educate the community about the law, need clear determinations about the meaning of discrimination and its consequences. The lack of guidance about how the court will interpret the law is also a problem for the parties, lawyers and conciliation staff when they are attempting to
resolve a complaint and it is an ongoing issue for respondents who do not know what compliance requires, nor is the law serving a deterrent function.

The picture painted in the preceding section suggests that we should be against settlement in the context of discrimination complaints due to the way that it is impeding the law’s development. Encouraging court decisions – public statements of law that apply universally – is the only way of repairing this damage. However, tipping the scales in favour of adjudication is not desirable either; ADR has proliferated due to the problems with courts including delays, costs, and complex rules and procedures. So a system that leans towards adjudication may meet society’s public interest in eliminating discrimination but it will not necessarily meet the private goals of the parties such as cost, expediency, addressing the non-legal issues and reaching an appropriate resolution.48 As Luban has argued, taking away ADR as an option would be just as undesirable as a world without adjudication (1994–1995: 2640–2642). Commenting on designing a process for resolving employment discrimination complaints, Sternlight says that a single process is unlikely to work; it is necessary to offer adjudication and ADR (2004: 1490). Nevertheless, there needs to be a balance. At present, that balance is tipped in favour of ADR – all complaints are subjected to ADR regardless of whether they are ‘run of the mill’ or could potentially set a precedent. If ADR is to continue to be used to resolve discrimination complaints, it is essential that every complaint is not channelled into this forum or the law’s development will remain stunted, thus participating in ADR should be optional.

III – REFORMING THE AUSTRALIAN SYSTEM

Thornton says that the individual complaints system was introduced in Australia in the expectation that the resolution of each individual complaint would have a “positive ripple effect and deter other potential discriminators” (1995: 83). However, as Parts I and II showed, the way the system is currently operating, individual complaints can have only a limited effect on eradicating discrimination. The following problems are contributing to this: the same process is applied to all complaints, most notably ADR is not voluntary – parties are required to attempt to settle before they can litigate; conciliation is facilitative, rather than ‘hands-on’; and the complaint resolution process is privatised so there is little publicly available information about settlements and no way for society to evaluate whether the process is delivering justice. Thus, the system itself is mitigating the effect an individual complaint can have on other instances of discrimination by restricting the number of ‘ripples’ generated in society.
This section proposes modifications to the complaint resolution model that would address these problems. It discusses three changes based on mechanisms used in the United States, Britain, Northern Ireland and Ireland: direct access to the court or tribunal; voluntary ‘rights-based’ conciliation or adjudication; and increasing the information flow about the complaint resolution system by encouraging the Equality Commission and the tribunal to release information about settlements regularly. Each aspect of this model is discussed in the context of the country from which it was drawn. Anti-discrimination laws in these countries are not covered comprehensively. The purpose of this discussion is to provide suggestions for addressing the problems identified with the Australian system in the preceding sections, drawing upon the mechanisms used in those countries.49

Resolving Discrimination Complaints in the United States, Britain, Northern Ireland and Ireland

This section presents an overview of the process of resolving an individual discrimination complaint in the comparative countries. The overview highlights the shared characteristics of each country: ADR is available as an alternative to litigation; attempting to resolve the complaint through ADR does not preclude litigation; ADR is voluntary and conducted separately from the Equality Commission; and most of these countries offer direct access to adjudication.

The Equal Employment Opportunity Commission (“EEOC”) is the federal agency responsible for investigating complaints about employment discrimination in the United States of America. Before a complainant can file a lawsuit in federal court, they must file a ‘charge’ with the EEOC. The EEOC investigates each charge, operating as a neutral fact-finder. Based on this investigation, if the EEOC finds that there is reasonable cause that discrimination has occurred, it attempts to resolve the charge by conference, conciliation or persuasion. Since 1999, the EEOC has offered voluntary mediation, which is conducted separately from the Commission. If the parties cannot reach agreement through a conference, conciliation, persuasion or mediation, the complainant can litigate. Alternatively, the EEOC may decide to litigate the charge on the complainant’s behalf.50

In Ireland, complainants have direct access to the Equality Tribunal. The Equality Tribunal refers complaints to mediation unless one party objects.51 Otherwise, complaints are resolved through investigation, an informal hearing process. The Equality Authority is responsible for assisting complainants and educating the community about the law but it does not handle or resolve complaints.

There are separate Equality Commissions for Britain and Northern Ireland: the Equality and Human Rights Commission (“EHRC”) in
Britain and the Equality Commission for Northern Ireland ("ECNI"). The complaint resolution process is substantially the same in both jurisdictions. Claimants have direct access to the Employment Tribunals and to civil courts for non-employment related complaints. The Equality Commissions are not responsible for complaint handling or conciliation.\(^{52}\) Parties can choose conciliation for an employment related complaint. Conciliation is conducted by a government agency – the Advisory Conciliation and Arbitration Service ("ACAS") in Britain and the Labour Relations Agency in Northern Ireland. In October 2007, the three British Equality Commissions – the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission ("DRC") – were merged into one body – the EHRC. The complaint resolution structure was not radically altered. The discussion of Britain considers conciliation at the DRC. Although this information is largely historical, it is included because of the Commission’s success at introducing a ‘rights-based’ form of conciliation, which the new EHRC later adopted.\(^{53}\)

**Direct Access to Court**

As outlined above, in Australia a victim of discrimination is required to lodge a complaint at the Equality Commission before they can proceed to court. No jurisdiction offers direct access to court.\(^{54}\) By contrast, a complainant can lodge their discrimination complaint at the relevant tribunal in Britain, Northern Ireland and Ireland. The Equality Commission is not required to handle the complaint first, nor does it attempt to resolve it through ADR.\(^{55}\) The opportunity for the complainant to utilise ADR is not lost: in Britain, the Employment Tribunal automatically sends ACAS a copy of all employment related discrimination complaints filed at the Tribunal. ACAS has a duty to offer to resolve the complaint through conciliation. The process at the Labour Relations Agency in Northern Ireland is similar. The Irish model is slightly different because one body handles all types of discrimination complaints and it offers ADR and adjudication. The Equality Tribunal is a quasi-judicial specialist body that hears all of Ireland’s discrimination complaints. It was established so that discrimination cases would not swamp the general court system.\(^{56}\) The Tribunal’s objective is to provide an easily accessible, simple, straightforward forum for hearing discrimination complaints (Equality Tribunal, 2008a: 5). Complainants lodge their complaint at the Equality Tribunal and the complaint is mediated unless one party objects. A complainant can request a hearing, referred to as an ‘investigation’, if mediation is unsuccessful.\(^{57}\) The two processes are kept separate.\(^{58}\)

The direct access model differs from the existing Australian model in two ways: first, ADR is voluntary. This makes the complaint
resolution process more flexible. Complainants who want their ‘day in court’ can start that process without delay, while others, who want to resolve their complaint quickly and informally, have the option to attempt to resolve it through conciliation and litigation is available if that is unsuccessful. The second way that this model varies from the Australian one is that parties have direct access to the adjudicator. Under the direct access model, the Equality Commission’s involvement is not a pre-requisite to litigation and the Equality Commission is not required to conciliate complaints. Removing the complaint handling and the ADR function from the Equality Commission and offering direct access to the adjudicator in Australia would have two significant benefits. First, it would allow the Equality Commission to concentrate its resources elsewhere, such as on enforcement, because it is not preoccupied with complaint handling and resolution. Second, if the Equality Commission is not required to handle or conciliate complaints, there is no requirement or expectation that it will behave neutrally. Therefore, the Equality Commission could act as an advocate for the victims of discrimination and assist complainants without any perceived conflict of interest. The Equality Commission could choose complaints to assist strategically, based on whether they would develop the law or enunciate a precedent.59

A modified version of this model will come into force in Victoria in August 2011. The complainant will lodge their complaint at the Equality Commission which will continue to offer conciliation services but will not investigate the complaint.60 Alternatively, complainants will have direct access to a general civil administrative tribunal,61 which may mediate the complaint prior to hearing. Consequently, the Equality Commission will concentrate its resources on enforcement activities such as conducting investigations into systemic issues and intervening in relevant cases.62

Improving ADR

Like Australia, all of the countries discussed in this article offer ADR for resolving discrimination complaints. The EEOC offers conciliation and mediation; ACAS in Britain and the Labour Relations Agency in Northern Ireland provide conciliation services in employment discrimination matters; the DRC offered non-employment disability discrimination complainants access to an independent conciliation service, as does the ECNI; and the Irish Equality Tribunal offers mediation. Thus, there is a shared view that the law should provide an alternative to litigation for resolving discrimination complaints. As outlined above, the Australian system would be improved if ADR was voluntary rather than a pre-requisite to court adjudication.

Some of the drawbacks of using conciliation to resolve discrimination complaints were explored in Part I including that conciliation may
exacerbate the existing power imbalances between the parties and it is privatised. Most significantly in the anti-discrimination arena, there is no guarantee that ADR protects the public’s long-term interest in eliminating discrimination or that it protects the individual’s rights, particularly if it is used as a case management technique. It was for this reason that Fiss likened ADR to the civil form of plea bargaining (1984: 1075). After examining how ADR was used to resolve discrimination complaints in the United States and Australia, Hunter and Leonard proposed a ‘rights-based’ model of conciliation, which attempts to overcome the problems with the traditional ‘facilitative’ model. Hunter and Leonard’s conciliation model is described in the first part of this section. In Britain, the DRC introduced conciliation for non-employment disability discrimination complaints based on this model. The second part of this section considers the DRC’s experience with ‘rights-based’ conciliation and outlines why it would be advantageous to use this approach to resolve discrimination complaints in Australia.

‘Rights-Based’ Conciliation

Hunter and Leonard identified three problems with using ADR to resolve discrimination complaints, namely privacy, the power imbalance between the parties and that ADR does not take legal rights into account (1997: 305–310). Hunter and Leonard suggest that if ADR is used to resolve discrimination disputes, it must reflect the aims of, and ensure compliance with, the legislation (1997: 310). They believe that a ‘rights-based’ approach, as opposed to a facilitative approach, which the Australian Equality Commissions currently use, is more appropriate for discrimination complaints. Hunter and Leonard state that the ‘rights-based’ process of resolving discrimination complaints has the following features: Conciliation is optional, settlements are binding and presumptively a matter of public record and Conciliators are responsible for ensuring the parties are informed of their rights and that the objectives of the legislation are met through the conciliation process (1997: 311–312). Under this model, the Conciliator assumes a central role. To do this effectively, Hunter and Leonard state that Conciliators require expertise in discrimination law and training in conciliating discrimination cases. They see the Conciliator’s role as requiring more than neutrally facilitating any agreement reached by the parties. The Conciliator is responsible for ensuring that the process furthers the objectives of the legislation and that settlements do not breach the law (1997: 311–312).

Implementing ‘Rights-based’ Conciliation: The DRC

When it established the DRC in 2000, the British government recognised that there was also a need for a conciliation service for
non-employment based disability discrimination complaints (O’Brien, 2005: 256). Therefore, unlike the older British Equality Commissions, the DRC’s founding legislation empowered it to make arrangements for the provision of conciliation for complaints about goods, facilities and services, and education. 63 The legislation provided that a member or employee of the DRC could not provide conciliation services, thereby ensuring that conciliation was kept at arm’s length from the Commission. 64

The DRC established an independent conciliation service, staffed by outsourced conciliators. 65 Conciliations did not take place on the DRC’s premises. 66 Parties were referred to the conciliation service by the DRC; they could not access it independently. 67 Both parties had to consent to conciliation. 68 During its six years in operation, the service dealt with more than 500 complaints. 69 Settlement rates were approximately 80 percent (Doyle, 2007: 60). The conciliation model that the DRC introduced bore the hallmarks of Hunter and Leonard’s approach. The DRC implemented an active, ‘rights-based’ approach to conciliation. O’Brien says that the Commission did this so that it could move beyond the perceived limits of the conciliation model used by ACAS (2005: 257). Conciliation at ACAS is similar to conciliation at the Australian Equality Commissions – Conciliators are facilitators, they do not take a view of the merits of the complaint and settlements are confidential (Dickens, 2007: 479). By contrast, the key aspects of the DRC’s ‘rights-based’ approach were: participation was voluntary, settlements were binding and a matter of public record; and Conciliators had expertise in disability discrimination law and training in conciliating disability complaints (O’Brien, 2005: 257; Crowther, 2005: 16). The Conciliator was not ‘hands-off’ and facilitative, nor did they “promote settlement at any cost” (Doyle, 2007: 60). In keeping with the ‘rights-based’ approach, the Conciliator took an active role in the resolution process, promoting discussion and understanding between the parties and ensuring that each party understood their legal rights and responsibilities. This approach was not premised on the parties being equal. The DRC described it as based on:

the fact that rights and obligations exist between them [the parties]... [it] puts the rights of disabled people as a non-negotiable issue within the conciliation process. The conciliator must be active in ensuring that the complainant’s issues are addressed and in suggesting ways for the education or service provider to meet their obligations, and be clear about whether a proposed solution would uphold the complainant’s rights (Crowther, 2005: 17).

By introducing a ‘rights-based’ approach, the DRC anticipated that the parties would come to a greater understanding of the issues and circumstances which led to the complaint (Doyle, 2007, 60). Reflecting on the
conciliation service shortly before the DRC closed, Mediator Margaret Doyle wrote:

I have been surprised at the openness of some very large organisations and their willingness to accept responsibility for discriminatory behaviour, to provide redress for the claimant and to make wide-ranging (and sometimes very costly) changes. I have also been impressed by the very small respondents – the corner shops and family-owned restaurants – who take on board what they hear at mediation and appreciate the opportunity it gives to learn more about how they should treat their service users and how they can keep their custom (2007: 61).

The DRC reported that there were instances when conciliation resulted in a systemic change. For example, a respondent agreed to make toilet facilities in a public house accessible to disabled persons. A university agreed to audit its policies, practices and procedures in order to make its courses and teaching materials more accessible for disabled students. Retailer Debenhams agreed to improve disability access to its department stores and to make the mezzanine levels in 16 of its stores accessible to disabled people within six months of the agreement. These outcomes are not available to the court to remedy a disability discrimination complaint, but the respondent was prepared to agree to them during conciliation.

Strengths of the ‘Rights-based’ Approach

The ‘rights-based’ approach retains all of the advantages of conciliation, as identified in Part I. It is quick, informal, cost-effective and parties retain control over the outcome. Most importantly, it addresses three of the criticisms identified above. First, that conciliation may exacerbate existing power imbalances between the parties. The ‘rights-based’ approach empowers the Conciliator to play a more active role. The Conciliator maintains the focus on the complainant’s experience and their rights and can offset any power imbalance and ensure that one party does not dominate the discussion. This relates to the second criticism of conciliation – there is no guarantee that the party’s rights and the law’s objectives will be upheld. By taking a ‘rights-based’ approach, the complainant’s rights are central and a focal point of the discussion, rather than the conciliation process turning into a negotiation about compensation or a civil plea bargain, as Fiss fears. Further, if the Conciliator plays an active role and they are charged with ensuring that the law’s objectives are met and the complainant’s rights are upheld, conciliation is more likely to result in a systemic outcome. The examples from the DRC show that this approach to conciliation resulted in changes to the respondent’s policies and practices, in keeping with the objectives of the legislation. It is not possible to determine why the respondents in those complaints
were willing to do more than the court could order them to do. Financial considerations and avoiding a trial are likely to have played a part. There is another possible explanation. The respondent may have reached a level of understanding about the circumstances which led to the complaint and the effect it had on the complainant. They were thus more willing to take measures to ensure that the same thing did not happen to another disabled person. The third criticism of conciliation is that it is confidential, both its process and outcome, which contributes to the privatisation of discrimination complaints. The ‘rights-based’ approach addresses this through the presumption that conciliation agreements are public. This can be rebutted in circumstances where the parties require their names and details of the complaint to remain confidential, so it is not a blanket prohibition on confidentiality and it is flexible enough to meet the parties’ needs.

**Increasing the Information Flow about Discrimination**

As discussed, there is very little publicly available information about discrimination settlements in Australia, particularly the outcomes that the parties negotiated. This is not the situation in other countries: the Equality Commissions have a policy of disseminating information about complaints, including those that settle prior to hearing. For example, the Irish Equality Tribunal publishes information about settlements and hearings as part of its “policy of transparency and accessibility” (2008a: 5). The ECNI says its aim in publishing an annual compilation of settlements is to raise awareness about unlawful discrimination, illustrate the issues that may arise out of discriminatory practices and highlight successful outcomes (2007–2008: 1).

The following overview of the information published in other countries shows that the lack of available information in Australia is unusual. It also shows that publication does not compromise the parties’ privacy: in many instances, factual information is de-identified.

- The EEOC issues a media release for all of the charges it files and settles on behalf of complainants, which includes the settlement terms.73
- The ECNI publishes an annual Decisions and Settlements Review. This includes identified facts and outcomes of all the complaints that the ECNI assisted during that period.74
- The DRC published the facts and settlement outcomes of conciliated complaints, identified or anonymous, in a regular Legal Bulletin;75
- The Equality Authority publishes identified information about the cases it assists, including those which are settled, in its Annual Report;
- The Equality Tribunal lists any significant and novel aspects of mediation settlements in its annual Mediation Review. Settlements are described anonymously and without facts;
• The Equality Tribunal also publishes an annual review of investigated cases. This publication describes cases relating to each of the prohibited attributes and areas and those which refer to the fundamental concepts of equality law. Cases are included that deal with issues that are likely to be relevant and of interest to parties involved in subsequent cases (2008a: 5).

The information available in these countries has three features in common: the Equality Commission regularly releases information to the community about discrimination complaints; information is published about complaints that settled before hearing, as well as complaints that were adjudicated; and a description of the facts, anonymous or otherwise, is included and the negotiated settlement. Increasing the amount of publicly available information about discrimination complaints in this way in Australia would elevate the law out of the private sphere and overcome one of the key limitations of settlement. This would enhance the law’s positive ripple effect in the following ways: publishing information helps to maintain the law’s profile; it is a guide for other complainants and a deterrent for would-be discriminators; it shows the law ‘in action’; and it reminds the community that discriminating has consequences.

Against Settlement? Or Against Some Settlements?

During the 25 years since Against Settlement was published, scholars have revisited Fiss’s opposition to settlement, particularly in light of the growth of ADR in a variety of legal disputes. Some have argued that it is not settlement itself that should be opposed, only some settlements or, for Luban, the wrong settlements (1994–1995: 2647). The question that should be asked is not whether to settle but when (Luban, 1994–1995: 2620; Menkel-Meadow, 1994–1995: 2668). Menkel-Meadow states:

The more fruitful inquiry is to ask under what circumstance adjudication is more appropriate than settlement, or vice versa. In short, when settlement? (1985: 498)

A simplistic answer to Menkel-Meadow’s question is that settlement should be favoured when the case is not likely to develop the law or secure a precedent. In such instances, ADR should be preferred. The problem with that response is that it offers no guidance about how to distinguish these cases or who should be responsible for doing so. In the context of discrimination complaints, should it be the role of the judge or court registrar to decide whether a complaint should be conciliated or adjudicated? Should it be the parties’ decision or one of the Equality Commission’s functions? Menkel-Meadow does not think that it is possible to assign cases to a particular process in advance (1994–1995: n139) and while Sternlight agrees, she says we must at least
decide who will make this decision and on what basis (2002-2003: 304). At present, this is not considered in Australia. Complaints are subject to ADR regardless of their precedent value and it is for the parties and their lawyers to decide whether to resist settlement and go to court. Modifying the system in the ways considered in Part III would mean that parties had a choice and could proceed to adjudication if they desired but this would not stop the ‘wrong’ cases from settling. In Sternlight’s opinion, the Equality Commission is better suited than the parties to decide whether a complaint has public as well as private implications and should be litigated (2004: 1495). In the United States, the EEOC can litigate on the complainant’s behalf and because it acts in the public interest, it can still litigate if the complaint has settled (EEOC v Waffle House Inc 534 US 279 (2002), 286). The Equality Commissions in the United Kingdom and Ireland can assist complaints to resolve the dispute, including by funding litigation. Significant decisions from the European Court of Justice in regard to gender discrimination were established this way (Alter and Vargas, 2000). Due to the role that the Australian Equality Commissions have traditionally played in handling and resolving complaints, they have not been given this function.\(^78\) For the law to develop and meet its objectives, it is not only necessary to modify the enforcement structure, the Equality Commission’s functions also need to be reconsidered.

**CONCLUSION**

This article explored how using ADR to resolve discrimination complaints in Australia has resulted in a system that typifies Fiss’s opposition to settlement, particularly his concern about the law’s development. Most complaints are resolved in the privacy of conciliation, with a strict confidentiality clause; very few are decided through a public hearing. The effect of this is that the body of case law remains quite small, even though discrimination has been prohibited for over thirty years. Modifying the complaint resolution process in the following ways would address some of these concerns. First, introducing direct access to the court or tribunal. Second, giving parties the choice of resolving their complaint using ADR or adjudication. Third, strengthening the current conciliation model by incorporating a ‘rights-based’ approach. Fourth, encouraging the Equality Commissions and the courts to publish specific information about settlements and significant cases regularly as a guide for potential complainants and to increase community awareness of discrimination. Instead of typifying Fiss’s concerns with settlement, the system would strike a balance by recognising that ADR and settlement are appropriate in some cases but for the law to develop, adjudication cannot be precluded.
NOTES

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 throughout to describe the agency.

2 In the States and Territories, a general civil tribunal hears discrimination cases. The Federal Courts hear federal cases. ‘Tribunal’ and ‘court’ are used interchangeably throughout except in reference to a specific court or jurisdiction.

3 The interviews were conducted in 2007 for a larger study, ‘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.


9 Above n7.

10 On conciliation at the AHRC, see Raymond and Georgalis (2002).

11 See eg Australian Human Rights Commission Act 1986 (Cth), s 46PK.

12 See eg Anti-Discrimination Act 1977 (NSW), s 91A.

13 See eg Anti-Discrimination Act 1998 (Tas), s 75(4)(b).

14 See eg Equal Opportunity Act 1984 (WA), s 88.


16 Email from Tracey Raymond, Australian Human Rights Commission, to Dominique Allen, 4 December 2009; Email from Karen Toohey, Victorian Equal Opportunity and Human Rights Commission, to Dominique Allen, 23 May 2010. Limited resourcing and the restrictions in the Privacy Act 1988 (Cth) also explain the difficulties that these institutions have in providing this information. The Queensland Anti-Discrimination Commission and the now defunct Anti-Discrimination Tribunal were notable exceptions. Both institutions permitted the author to examine settlement agreements negotiated over a calendar year and to extract de-identified data for research purposes.

17 The Federal Court, the New South Wales Administrative Decisions Tribunal, the Queensland Civil and Administrative Tribunal, the Anti-Discrimination Tribunal (Tasmania), the Victorian Civil and Administrative Tribunal and the State Administrative Tribunal (WA) use mediation.

18 The tribunals’ websites discuss mediation in more detail. In New South Wales, mediation is conducted by a tribunal member. In Victoria and Queensland, mediation is conducted by a tribunal member, a registrar or a trained mediator. In federal matters, a registrar usually conducts mediation.
19 Unless the Equality Commission declines the complaint, in which case the complainant may lodge the complaint at the tribunal where the respondent may apply to strike out the complaint or it may be referred to mediation.


21 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.

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

23 34 discrimination matters were referred to mediation. Of all federal law matters which were mediated, more than 50% resolved.


26 Although this is a process of negotiation and it is influenced by many factors including economic ones, such as the legal fees that the parties are incurring (Allen, 2009: 786–788).

27 The AHRC does not publish information on the respondents’ representation. Empirical studies of discrimination complaints have examined representation across various jurisdictions (Charlesworth, 2008: Table 115; Hunter and Leonard, 1995: 4–5; Gaze, 2000: 126).

28 Gonzalez and McCabe (2003: 9) note that lawyers change “the dynamics” of conciliation of discrimination complaints. They suggest that this is 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.


31 Fiss also criticises ADR on this basis (1984: 1075).

32 In its 2008–2009 Annual Report, the Commission noted that in the previous five years, the success rate for resolving complaints at conciliation had increased by 26 percent (2008–2009: 17).

33 Fiss (2009) traces the genesis of his opposition to settlement to his experience working in school desegregation cases.

34 An example Fiss provides is school desegregation cases, some of which had continued for 20 years, such as Brown v. Board of Education 84 FRD 383 (D. Kan. 1979) in which the child of one of the plaintiffs in the original Brown case sought to intervene on behalf of a class of students.

35 The following year, the Supreme Court considered the implementation of its original decision. The case was returned to the District Court with the
requirement that the plaintiffs were admitted to public schools on a non-discriminatory basis ‘with all deliberate speed’: 349 US 294 (1955), 757.


This is the practice of the AHRC and the Queensland Anti-Discrimination Commission, for example.

A recent review of the Equal Opportunity Act 1995 (Vic) recommended that the Equality Commission should collate and disseminate de-identified settlement outcomes (Department of Justice (Vic), 2008: Recommendation 33). Amendments to the Act will allow the Equality Commission to disclose information about complaints if it is de-identified or already in the public domain or the parties have consented to the disclosure, subject to limitations imposed by other laws in regard to the collection of information and provided that the information is disclosed for the purpose of the Equality Commission’s educative function: Equal Opportunity Act 2010 (Vic), s 177.

It is an objective of the laws in Victoria, the Australian Capital Territory, Queensland, the Northern Territory and Western Australia.

Unlike other countries, Australia has a relatively weak regulatory regime for addressing discrimination. See further Smith (2006: from 723).

See Table 1 above.

The low number of decided cases is not recent: it characterises the legislation’s history in many Australian jurisdictions (Allen, 2009: 781–782).


Waters v Public Transport Corporation, IW v Perth, X v Commonwealth and Purvis v New South Wales: above n43

Gerhardy v Brown: above n43.

Ibid.

On public, private and procedural interests in anti-discrimination law, see further Sternlight (2004: from 1483).

For a comparative analysis see eg O’Cinneide (2002); Hepple et al (2000); Coussey (2002); Sternlight (2004); Chi-hye Suk (2006).


A complaint.

Civil Rights Act, s 706(b). Conciliation is facilitated by an EEOC employee: (Sternlight, 2004: 1415). It is separate from the enforcement unit and the legal staff: Interview with Lisa Sirkin, Supervisory Trial Attorney, EEOC (New York City, 12 September 2007).

Mediated charges take almost half as long as other forms of EEOC resolution (Miller, (2001: 20). For the history of the program, see http://www.eeoc.gov/eeoc/mediation/history.cfm (accessed 20/5/10).
Settlement constitutes the final resolution of the charge and is enforceable by the EEOC. If the parties do not settle, the charge will either be returned for investigation or the EEOC will dismiss it, giving the complainant the option to litigate: Civil Rights Act, s 706(2)(f).

54 A separate section of the EEOC administers mediation. It is staffed by a combination of mediators employed by the EEOC and contractors. Some field offices also use volunteer mediators: Interview with Professor Rick Rossein, School of Law, City University of New York (New York City, 12 September 2007); Sirkin, above n52.

55 If the EEOC decides not to proceed with the complaint it issues a ‘notice of right to sue’ so the complainant can file the charge in court. If the EEOC is taking too long to investigate, the complainant can bypass the EEOC process and commence litigation immediately by requesting the EEOC to close the case and issue a notice of right to sue. On average, it takes 180 days after filing to close the case and issue a notice of right to sue. In practice, due to the backlog of charges, it is easy to request a right to sue letter and most complainants are issued with one: Interview with Professor Rosalie Levinson, Valparaiso Law School (Valparaiso, 6 September 2007).

56 The enforcement unit and legal staff are separate from the conciliation staff: Sirkin, above n52.

57 The Tribunal keeps the two processes separate: see below n64.


59 From 2002–2007, the DRC provided an outsourced conciliation service for non-employment complaints, as discussed further below. When the EHRC commenced operation, it took over this function and now offers ‘rights-based’ conciliation services in Britain. Based on the DRC’s success, the ECNI also introduced a conciliation service for non-employment disability complaints in September 2007: Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007). See the Equality (Disability Etc.) (Northern Ireland) Order 2000, Art 12.

60 In Britain, when a discrimination complaint is filed at the Employment Tribunal, ACAS is automatically sent a copy of the complaint and it has a duty to offer to settle it through conciliation. The process is similar in Northern Ireland. See further Susson and Taylor (2006:29).


62 As described below, the Victoria legislation was recently amended in this way but it does not come into force until August 2011.

63 The exception is the DRC’s conciliation service, discussed below. The new EHRC now offers conciliation services: above n61.

64 Interview with Bernadette Treanor, Equality Officer, Equality Tribunal (Dublin, 27 September 2007).

65 Most unsuccessful complainants request this: Treanor, above n64. The mediator issues a non-resolution notice and the complainant has 28 days to apply for the complaint to be investigated: see eg ESA(1), s 24(6)(b). In 2008, 68% of the 157 complaints referred to mediation were settled (Equality Tribunal, 2008b: 11–12).
66 A staff member who has a dual role as an Equality Mediation Officer and an
Equality Officer will not perform both functions for the same complaint.
The information provided at mediation is not available to the investigating
Equality Officer: Treanor, ibid.
67 Eg the DRC engaged in strategic enforcement during its existence. See
further O’Brien (2005).
68 Equal Opportunity Act 2010 (Vic), s 113(1).
69 Ibid s 122.
70 Ibid Part 9.
71 Those under Parts III and IV of the Disability Discrimination Act 1995
(“DDA(UK)”) respectively. The Disability Rights Commission Act 1999
(UK) (“DRCA”), s 10 empowers the DRC to arrange conciliation of Part III
complaints and the Special Educational Needs and Disability Act 2001 (UK)
extends this to Part IV complaints. The legislation describes the process as
‘conciliation’ but the DRC saw it as more like ‘mediation’ (Doyle, 2007:
57). For ease of comparison, conciliation is used herein.
72 DRCA, s 10(3).
73 For the first year, the Disability Access Rights Advice Service handled
conciliation. From March 2001, Mediation UK, a registered charity and
community based service, was contracted to run the Disability Conciliation
Service (O’Brien, 2005: 256). The DRC’s literature refers to the facilitators
as ‘mediators’, despite referring to the service as ‘conciliation’.
74 The Disability Conciliation Service tried to arrange meetings in person and
at the nearest neutral accessible venue to the complainant’s home (Crowther,
75 To determine if a complaint was appropriate for conciliation some of the
factors the DRC considered were whether the complainant met the
DDA(UK)’s definition of ‘disabled’, when the incident took place, the age
of the complainant, and whether conciliation was the best way to proceed
(Crowther, 2005: 18).
76 Interview with Nick O’Brien, Director of Legal Services, Disability Rights
77 The British courts do not classify discrimination complaints, so it is not
possible to know what proportion this represents of the total number of cases
(Doyle, 2007: 60).
78 Kirwan v Spirit Group Limited, trading as Shirley Inn [2006]. Reported in
79 Chan v Bradford University [2004]. Reported in Disability Rights
80 Jackson v Debenhams P/c [2006]. Reported in Disability Rights
82 It is the ECNI’s policy not to agree to confidentiality for those complaints
it assists. Other parties are free to agree to confidential settlements. It is for
this reason that all the complaints which appear in this publication are iden-
tified.
83 See eg facts and outcomes of conciliated complaints discussed in Crowther
(2005: 21–22) and facts of settled and litigated complaints in Disability
84 Eg four cases that considered the burden of proof were highlighted in Equality Tribunal (2006: 93–94).
85 See eg academic papers from a symposium evaluating Against Settlement after 25 years: (2009) 78 Fordham Law Review.
86 I have argued elsewhere that the Australian Equality Commission should be able to engage in enforcement activities, including assisting complainants and litigating complaints: (Allen, 2009: 795; Allen, 2010b).

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