

STRATEGIC ENFORCEMENT OF ANTI-DISCRIMINATION LAW: A NEW ROLE FOR AUSTRALIA'S EQUALITY COMMISSIONS

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In Australia, anti-discrimination law is enforced by individuals who lodge a discrimination complaint at a statutory equality commission. The equality commission is responsible for handling complaints and attempting to resolve them. In most instances, the equality commission cannot advise or assist the complainant; it must remain neutral. In other countries, the equality commission plays a role in enforcement, principally by providing complainants with assistance to resolve their complaint including funding litigation. The equality commission's assistance function has been most effective when used strategically as part of a broader enforcement program, rather than on an ad hoc basis. This article discusses equality commission enforcement in the United States of America, Britain, Northern Ireland and Ireland and shows how the equality commissions in those countries have engaged in strategic enforcement in order to develop the law and secure remedies which benefit the wider community, not only the individual complainant. Based on their experience, it is argued that the Australian equality commissions should play a role in enforcement so that they can tackle discrimination more effectively.

I INTRODUCTION

In Australia, anti-discrimination law is constructed around an individual complaints-based model. The law is enforced by individual victims of discrimination who lodge complaints at the statutory equality commission¹ in their jurisdiction or at the Australian Human Rights Commission ('AHRC'). The

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1 The agencies created by anti-discrimination statutes not only vary in functions and responsibilities, they are also identified differently. The statutory agency is usually an Anti-Discrimination or Equal Opportunity Commission, Authority or Board. The federal agency and those in the Australian Capital Territory and Victoria have additional responsibilities for human rights and this is identified in their title. Similarly, the overseas agencies are identified in a variety of ways. For ease of reference, particularly to the overseas agencies, 'equality commission' is used throughout when referring to the agency in general terms. It may be argued that this is not the most accurate descriptor of the Australian agencies at present considering that the bulk of their workload is handling discrimination complaints. Given that the premise of this article is that the agency's role in tackling discrimination and inequality would be strengthened if it played a role in enforcement, 'equality' was selected in preference to 'equal opportunity' or 'anti-discrimination' commission.

role of the equality commission is to receive the complaint, investigate it and ascertain whether it comes within its jurisdiction and, if so, attempt to resolve it using Alternative Dispute Resolution ('ADR'). If it cannot be resolved, the complainant can ask the equality commission to refer the complaint to court for adjudication.

The premise of this article is that discrimination will not be tackled effectively in Australia until the equality commissions play a role in enforcing the law. This article examines one means of enforcement — assisting complainants to resolve their complaint. As Part II shows, the Australian equality commissions are primarily concerned with handling and resolving complaints. Two can assist complainants, but that is the exception, not the norm. This is contrasted with the equality commissions in the United States, Britain, Northern Ireland and Ireland. In these countries, the equality commissions can assist complainants, which includes providing informed advice about the merits of their complaint, arranging legal representation and funding litigation. Examples of how these equality commissions have used their assistance function are presented in Part III to show that by using this mechanism strategically, the equality commissions have developed the law and obtained remedies that extend beyond the individual complainant. Assistance is part of a broader strategy of enforcing the law, so it is used in conjunction with lobbying, education and communication. Based on the experience of the overseas equality commissions, Part IV proposes five reasons why it would be valuable for the Australian equality commissions to engage in assistance work. Essentially, the benefits of this function are that it would enable the equality commission to take a strategic approach to developing the jurisprudence and maintaining the law's profile. This would filter down and affect both the informal complaint resolution process and future cases. One of the equality commission's functions is to promote voluntary compliance and it is argued that this 'carrot' would be more effective if it was accompanied by the 'stick' of litigation from an experienced 'repeat player'.

Table 1: Equality Commissions

Equality Commission	Jurisdiction	Acronym
Australian Human Rights Commission	Australia	AHRC
Equal Employment Opportunity Commission	United States of America	USEEOC
Equality and Human Rights Commission	Britain	UKEHRC
Commission for Racial Equality	Britain	UKCRE
Equal Opportunities Commission	Britain	UKEOC
Disability Rights Commission	Britain	UKDRC
Equality Commission for Northern Ireland	Northern Ireland	ECNI
Equality Authority	Ireland	IEA

II THE EQUALITY COMMISSION AND ENFORCEMENT

Violations of anti-discrimination laws are civil wrongs, somewhat like torts, for which victims have the right to seek redress. Enforcement is achieved through what Dickens terms a ‘two-pronged approach’² — individual complaints and equality commission enforcement. Part II shows that in Australia, the law is primarily enforced through individual complaints. This is contrasted with the position in the United States, Britain, Northern Ireland and Ireland which also permit equality commission enforcement. Having established that the primary means of enforcement by the overseas equality commissions is by providing assistance to individual complainants, Part II concludes by highlighting the importance of taking a strategic approach to this activity. In this context, ‘enforcement’ refers to compliance with the law, primarily the non-discrimination principle, rather than the enforcement of a court judgment.³ Enforcement is also distinguished from ‘complaint handling’, which is the process of receiving and investigating a discrimination complaint. As this section explains, some equality commissions are only responsible for enforcement; others are also responsible for complaint handling.

A Australia

1 Individual Complaints

In Australia, anti-discrimination law is enforced through individual complaints in much the same way across the country: an equality commission acts as a ‘gatekeeper’ for complaints meaning that the equality commission must have the opportunity to resolve the complaint informally before the complainant can litigate.⁴ To fulfil this function, once the equality commission receives the complaint, it conducts an investigation in order to determine whether or not to accept the complaint. If it accepts the complaint, the equality commission will attempt to resolve it using ADR, usually conciliation. The equality commission does not make a decision on the merits; its role is to facilitate complaint resolution as a third party. If the complaint is not resolved, the complainant may decide to litigate. Most of the equality commissions’ work centres on receiving and resolving complaints, although the equality commissions in Queensland, New South Wales and Western Australia can appear as an *amicus curiae*⁵ and so can

2 Linda Dickens, ‘The Road is Long: Thirty Years of Equality Legislation in Britain’ (2007) 45 *British Journal of Industrial Relations* 463, 474 et seq.

3 On enforcement in the anti-discrimination context, see Martin MacEwen (ed), *Anti-Discrimination Law Enforcement: A Comparative Perspective* (Avebury, 1997).

4 From August 2011, complainants in Victoria will have the option of proceeding directly to court: see *Equal Opportunity Act 2010* (Vic).

5 *Anti-Discrimination Act 1991* (Qld) s 186; *Anti-Discrimination Act 1977* (NSW) s 99; *Equal Opportunity Act 1984* (WA) s 113.

AHRC Commissioners.⁶ Some State and Territory equality commissions⁷ and the AHRC⁸ can intervene in proceedings with leave of the court.

2 Assisting Individual Complainants

The majority of Australian equality commissions cannot assist individual complainants or fund litigation. The exceptions are the AHRC and the South Australian and Western Australian Equal Opportunity Commissions. The AHRC's assistance is limited and it is not financial. The AHRC can only assist a complainant with preparing the court forms to commence proceedings in the Federal Court.⁹ Another option for complainants and respondents in federal matters is to apply to the Commonwealth Attorney-General for legal or financial assistance with court proceedings on the basis of hardship.¹⁰ Since 2000, the Attorney-General has received 27 applications for financial assistance on that basis and has only approved nine grants of assistance.¹¹

Until 2009, the *Equal Opportunity Act 1984* (SA) stated that the Commissioner *must* assist a complainant with presenting their complaint before the tribunal if requested.¹² In a review of the State's anti-discrimination legislation the government said this creates a conflict because the Commission must handle the complaint impartially, yet it is required to represent the complainant.¹³ The review proposed repealing the requirement to assist the complainant and appointing an independent solicitor for that purpose.¹⁴ This proposal was not implemented. Instead, the law was amended to state that the Commissioner *may provide representation* for the complainant *or respondent* with presenting their complaint before the tribunal if requested.¹⁵ To date, the Commissioner has not received any requests for such assistance.¹⁶

6 *Australian Human Rights Commission Act 1986* (Cth) s 46PV.

7 Namely, the equality commissions in Queensland, Tasmania and the Northern Territory: *Anti-Discrimination Act 1991* (Qld) s 235(j); *Anti-Discrimination Act 1998* (Tas) s 7(b); *Anti-Discrimination Act* (NT) s13(q). From August 2011, the Victorian commission will also have the power to intervene and appear as amicus: *Equal Opportunity Act 2010* (Vic) ss 159, 160.

8 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o); *Sex Discrimination Act 1984* (Cth) s 48(1)(gb).

9 *Australian Human Rights Commission Act 1986* (Cth) s 46PT.

10 *Ibid* s 46PU.

11 Nine applicants did not proceed with their application and nine did not meet the eligibility criteria in *Australian Human Rights Commission Act 1986* (Cth) s 46PU(2). Applications are treated in confidence by the Attorneys-General, thus further information about the type of complaint or the applicant is not available: Email from Terina Koch, Principal Legal Officer, Financial Assistance Division, Social Inclusion Division, Attorney-General's Department to Dominique Allen, 9 August 2010.

12 *Equal Opportunity Act 1984* (SA) s 95(9), as repealed by *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).

13 South Australian Government, 'Review of South Australian Equal Opportunity Legislation' (Framework Paper, 2003) 41. The Opposition also recognised this problem: see South Australia, *Parliamentary Debates*, House of Assembly, 3 June 2009, 3020 (Isobel Redmond, Shadow Attorney-General).

14 South Australian Government, above n 13, 40.

15 *Equal Opportunity Act 1984* (SA) s 95C.

16 Email from Katherine O'Neill, Acting Deputy Commissioner, South Australian Equal Opportunity Commission to Dominique Allen, 13 April 2010.

The assistance provided by the Western Australian Equal Opportunity Commission is an anomaly in the Australian context. The *Equal Opportunity Act 1984* (WA) permits the Commissioner to arrange legal representation or funding for the complainant to appear in the Supreme Court.¹⁷ The Commission is also required to provide the complainant with legal assistance if the Commissioner refers their complaint to the State Administrative Tribunal.¹⁸ The Act does not specify the type of assistance the Commission must provide. In practice, the Commission's Legal Officers provide legal representation and their workload is supplemented by pro bono work conducted by private law firms under an arrangement with the Commission.¹⁹ Assistance typically involves providing an assessment of the case, including the merits, representing the complainant at a directions hearing, and preparing pleadings and documents for discovery. If mediation at the Tribunal is not successful and the complainant has an arguable chance of success, the Commission's assistance may extend to a full hearing.²⁰ During the 2008–09 financial year, the Commissioner referred 42 complaints to the Tribunal.²¹ Almost 60 per cent settled or were withdrawn before hearing.²² Therefore, most of the assistance provided by the Commission is at the pre-litigation stage.

3 Fair Work Ombudsman

On 1 July 2009, the anti-discrimination framework was altered by the commencement of the *Fair Work Act 2009* (Cth). The Act prohibits employment discrimination across a range of attributes.²³ It is enforced by the Fair Work Ombudsman ('FWO') which has a wide range of powers including carrying out investigations, issuing compliance notices and conducting litigation.²⁴ The Act establishes a stronger enforcement model for addressing employment discrimination than traditional anti-discrimination laws, so undoubtedly it will change the anti-discrimination landscape. The discussion in this article focuses on the equality commissions because, as the sole regulators of anti-discrimination law for over three decades, there is considerable evidence about their operation, whereas the FWO is too new to evaluate effectively. Further, limiting the discussion facilitates the comparison with the overseas equality commissions.

17 *Equal Opportunity Act 1984* (WA) s 93A(1).

18 *Ibid* s 93.

19 Western Australian Equal Opportunity Commission, *Annual Report 2006–2007* (2007) 3.

20 Email from Jeff Rosales-Castaneda, Legal Officer, Western Australian Equality Opportunity Commission to Dominique Allen, 22 July 2008.

21 Western Australian Equal Opportunity Commission, *Annual Report 2008–2009* (2009) 43.

22 Thirty seven assisted complaints were carried over from previous years and there were 4 appeals and exemption applications, totalling 83 assisted complaints. 64 of those 83 matters were finalised: *ibid* 43–4, Tables 18, 19.

23 *Fair Work Act 2009* (Cth) s 351.

24 *Ibid* ss 706–17. See also Bill Loizides, 'FWO Discrimination Policy' (Guidance Note No 6, Australian Government FWO, 17 December 2009) <<http://www.fairwork.gov.au/guidancenotes/GN-6-FWO-Discrimination-Policy.pdf>>.

B The United States, Britain, Northern Ireland and Ireland

The enforcement of anti-discrimination law in the other countries examined in this article utilises both of Dickens' 'prongs' — individual complaints and equality commission enforcement.²⁵ Enforcement by the equality commission primarily involves assisting individuals to resolve their complaint. Although the equality commissions are empowered to conduct investigations into discrimination, principally into instances which appear to be widespread or of a systemic nature,²⁶ for differing reasons the equality commissions have found it difficult to conduct investigations, particularly in the United States²⁷ and Britain.²⁸ Consequently, the equality commissions focused their resources on assisting individual complaints and conducting litigation. For this reason, investigations are not examined further in this article.²⁹

This section presents an overview of both the complaint resolution process and the equality commissions' assistance function in the United States, Britain, Northern Ireland and Ireland. In addition to this function, the equality commissions can

25 See above n 2.

26 *Equal Employment Opportunity Act of 1972*, 42 USC §2000e-5(b) (2000); *Sex Discrimination Act 1975* (UK) ('SDA(UK)') c 65, ss 57, 58, 67; *Race Relations Act 1976* (UK) ('RRA(UK)') c 74, ss 48, 49, 58; *Disability Rights Commission Act 1999* (UK) ('DRCA') c 17, ss 3–5; *Equality Act 2006* (UK) c 3, s 20(2); *Employment Equality Act 1998* (Ireland) Number 21/1998, ss 62–5.

27 The USEEOC Commissioners can institute a Commissioner Charge of discrimination based on the Commission's knowledge of inequality at a workplace obtained from individual complaints. The USEEOC then investigates the charge and if the investigation uncovers enough evidence to suggest that discrimination is occurring, the Commissioner can bring suit. Initially, the USEEOC used Commissioner Charges to investigate companies thought to be engaging in systemic race discrimination. Some of the country's largest employers were investigated, namely Ford Motor Company, General Electric, General Motors and Sears, Roebuck & Co. However, due to its complaint handling responsibilities, which consumes most of its resources, the USEEOC has found it difficult to engage in enforcement activities. See further David L Rose, 'Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?' (1989) 42 *Vanderbilt Law Review* 1121, 1151 n 159. See also Julie Chi-hye Suk, 'Antidiscrimination Law in the Administrative State' [2006] *University of Illinois Law Review* 405, 440–4, 468.

28 When it established the UKCRE and UKEOC, Parliament expected them to act, and to be seen to be acting, as law enforcement agencies. Investigations were expected to be the equality commissions' main enforcement method. However, a series of judicial decisions subsequently scaled back their effectiveness and introduced cumbersome administrative procedures. Most famously, Lord Denning likened inquiries to the Inquisition: *Science Research Council v Nasse* [1979] 1 QB 144, 170. See also *R v CRE*; *Ex parte London Borough of Hillingdon* [1982] 3 WLR 159; *UKCRE v Amari Plastics* [1982] 2 WLR 972; *Re Prestige Group plc* [1984] 1 WLR 335. See also Catherine Barnard, 'A European Litigation Strategy: The Case of the Equal Opportunities Commission' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995) 258; Colm O'Connell, 'The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times' (2007) 36 *Industrial Law Journal* 141; George Appleby and Evelyn Ellis, 'Formal Investigations: The Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies' [1984] *Public Law* 236.

29 On investigations conducted by the British equality commissions, see, eg, Appleby and Ellis, above n 28; Alison Harvison Young, 'Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts in Britain and Northern Ireland: Some Comparative Lessons' (1993) 43 *University of Toronto Law Journal* 65, 95–125; O'Connell, 'The Commission for Equality and Human Rights', above n 28, 148–9; Chi-hye Suk, above n 27, 444 et seq; Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (Hart, 2nd ed, 2005) 357; Rupert Harwood, 'Teeth and Their Use: Enforcement Action by the Three Equality Commissions' (Report, Public Interest Research Unit, 2006).

appear as an *amicus curiae* or intervene in proceedings. These powers relate to the litigation stage and are not considered in detail in this article as the focus is on broader issues. It is acknowledged that the equality commissions could use their *amicus curiae* and intervention powers to accomplish some of the activities discussed in Part IV, such as developing the law. The experience of the overseas equality commissions shows that the *amicus curiae* and intervention powers are most effective when they are exercised as part of a program of strategic enforcement. However, it may be harder for the equality commission to achieve its strategic objectives this way because in a case in which it is a third party, the equality commission will have less control compared to when it assists the complainant. The equality issues may be peripheral to the matter, for example, or the equality commission may be required to frame its arguments around the issues raised by the parties.

1 Individual Complaints

In Ireland, discrimination complaints are lodged at the Equality Tribunal which resolves them through mediation or adjudication. The Equality Authority ('IEA') is not responsible for handling or resolving complaints. There are two equality commissions in the United Kingdom: the Equality and Human Rights Commission ('UKEHRC') in Britain and the Equality Commission for Northern Ireland ('ECNI'). The complaint resolution process is substantially the same. Complainants have direct access to Employment Tribunals and to civil courts for non-employment related complaints. The equality commissions are not responsible for complaint handling or conciliation.³⁰ In October 2007, the three British equality commissions — the Commission for Racial Equality ('UKCRE'), the Equal Opportunities Commission ('UKEOC') and the Disability Rights Commission ('UKDRC') — were merged into one body, the UKEHRC, which is responsible for all prohibited forms of discrimination. The discussion of Britain herein refers predominantly to the UKEHRC's predecessors and although it is historical, the information is still valuable because neither the role of the equality commission or the enforcement model were radically altered in 2007; the primary change was that the three existing equality commissions were amalgamated into the UKEHRC, and it assumed additional responsibility for human rights.³¹ The former equality commissions had up to four decades experience and each used the law and their enforcement functions in different ways with varying degrees

30 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. See generally Keith Susson and John Taylor, 'The Advisory, Conciliation and Arbitration Service' in Linda Dickens and Alan C. Neal (eds), *The Changing Institutional Face of British Employment Relations* (Kluwer Law, 2006) 25, 29. Complainants in a non-employment disability discrimination complaint could access an independent conciliation service between 2000–07: see below n 69. In September 2007, the ECNI established a similar conciliation service for Northern Ireland: see *Equality (Disability Etc)(Northern Ireland) Order 2000* (NI) SR 2000/1110 art 12. The UKEHRC now provides a voluntary conciliation service.

31 The UKEHRC has a wider range of enforcement powers at its disposal, such as compliance notices and an inquiry function. Thus, it has engaged in a different range of activities than its predecessors. It is outside the scope of this article to consider these activities further.

of success, as discussed throughout the article. Interviews were conducted with key staff at the UKCRE and UKDRC immediately prior to the merger to gain an insight into how the equality commissions used their enforcement functions and to determine the value of introducing such an approach in Australia.

The Equal Employment Opportunity Commission ('USEEOC') is the federal agency responsible for investigating complaints about employment discrimination in the United States.³² Like the Australian equality commissions, the USEEOC is a gatekeeper, so before a complainant can file a lawsuit in federal court they must file a 'charge' (a complaint) with the USEEOC. The role of the USEEOC is to investigate each charge. The Commission operates as a neutral fact-finder. If it finds that there is reasonable cause that discrimination has occurred, the USEEOC attempts to resolve the charge by conference, conciliation or persuasion.³³ If the parties cannot reach agreement, the complainant can litigate.³⁴

2 Assisting Individual Complainants

The equality commissions in the United Kingdom and Ireland can assist complainants with resolving their complaints.³⁵ A complainant can contact the equality commission and, provided they meet certain criteria, the equality commission may decide to assist them. For instance, under the *Race Relations Act 1976* (UK) ('RRA(UK)') 'assistance' includes offering advice, trying to procure a settlement, arranging for advice from a solicitor, and arranging legal representation.³⁶ Since they do not play a part in complaint resolution, the United Kingdom and Irish equality commissions can assist complainants from the beginning of the process.

The situation in the United States is different. Since it is a gatekeeper, the USEEOC cannot litigate a charge on behalf of a complainant until it has attempted to resolve the charge informally.³⁷ If the parties cannot reach an agreement through ADR, the complainant can litigate, or the USEEOC may decide to litigate the

32 The USEEOC enforces: Title VII of the *Civil Rights Act of 1964*, 42 USC §2000e (1964); *Age Discrimination in Employment Act of 1967*, 29 USC §633a (1967); Titles I and V of the *Americans with Disabilities Act of 1990* 42 USC §§ 12101 (1990). Other federal institutions are responsible for non-employment based discrimination. For example, the Civil Rights Division of the Department of Justice is responsible for enforcing Title III of the *Americans with Disabilities Act* which prohibits discrimination on the basis of disability in public accommodation. Most states also have laws prohibiting discrimination and a civil rights division within the executive to enforce these laws. See generally Lisa Guerin and Amy DelPo, *The Essential Guide to Federal Employment Laws* (NoLo, 2009).

33 *Civil Rights Act of 1964*, 42 USC §2000e-5 (1964).

34 See Jean R Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401, 1402–3.

35 SDA(UK) s 75(1); RRA(UK) s 66 (the UKCRE also partly funded a network of more than 80 local Race Equality Councils that could advise and assist race discrimination complainants); DRCA s 12; *Race Relations (Northern Ireland) Order 1997* (NI) SR 1997/869 art 64(7); *Sex Discrimination (Northern Ireland) Order 1976* (UK) art 75; *Equality (Disability Etc) (Northern Ireland) Order 2000* (NI) SR 2000/1110 art 9; *Employment Equality Act 1998* (Ireland) Number 21/1998 s 67. The UKEHRC can also provide assistance: *Equality Act 2006* (UK) c 3, s 28.

36 RRA(UK) s 66(2).

37 *Civil Rights Act of 1964*, 42 USC §2000e-5(f)(1) (1964).

charge on the complainant's behalf. Therefore, the USEEOC's assistance function applies only if ADR is unsuccessful and the complainant decides to litigate. The USEEOC can also litigate if the complainant settles the charge; because it acts in the public interest, it can bring an action which will benefit other people.³⁸ Unlike the United Kingdom and Irish equality commissions, the USEEOC can assist a group of complainants.³⁹

C Modifying the Australian Approach

The overseas equality commissions considered in this article that have used their assistance function most successfully do not play a role in complaint handling or provide ADR.⁴⁰ Without the responsibility for complaint handling or providing ADR, an equality commission can focus on enforcing the law, including through assisting complainants. Therefore, so that the Australian equality commissions can act as an advocate for the victims of discrimination, they should be divested of their complaint handling and conciliation functions. Either a separate agency⁴¹ or the court⁴² would assume these functions, thereby enabling the equality commissions to focus on strategic enforcement, including through assisting complainants. According to Hepple, this is why complaint handling was taken away from the British Race Relations Board (the UKCRE's predecessor); so that the Board could take a broader, strategic approach to addressing discrimination, it was freed from resolving individual complaints.⁴³

Of course, it is possible simply to separate the equality commission's complaint handling arm from its enforcement arm, which is the model used in the United States. Likewise, the equality commissions in Western Australia and South Australia currently have separate enforcement arms. However, these three equality commissions have used their assistance function to limited extent, especially in comparison to the overseas equality commissions that do not handle complaints, as the remainder of this article shows. This suggests that there is a causal link between an equality commission possessing complaint handling and enforcement

38 *EEOC v Waffle House Inc*, 534 US 279, 286 (2002).

39 If a charge is not resolved and it relates to 20 complainants or less, the field office's legal section will review it to determine whether it is a charge that is suitable for it to litigate using staff trial attorneys. For charges with a class of more than 20 harmed parties, the Commission must vote on whether or not to litigate: Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007). An example is the Restaurant Daniel litigation, discussed in Part III.

40 Compare the work of the UKDRC and ECNI with the USEEOC, for instance, as discussed in Part III. On the USEEOC, see below n 59.

41 For example, in Britain, ACAS is responsible for the voluntary conciliation of employment related discrimination complaints.

42 For example, in Ireland, the Equality Tribunal offers complainants a choice of mediation or adjudication to resolve their complaint. In the industrial relations jurisdiction in Australia, the enforcement agency is not responsible for ADR or adjudication.

43 Bob Hepple, 'The Equality Commissions and the Future Commission for Equality and Human Rights' in Linda Dickens and Alan C Neal (eds), *The Changing Institutional Face of British Employment Relations* (Kluwer Law, 2006) 101, 106. See also Christopher McCrudden, David J Smith and Colin Brown, *Racial Justice at Work* (Policies Study Institute, 1991) 15.

functions, and it using the latter to a limited extent. One explanation for this is the resources consumed by complaint handling. During its existence, complaint handling has consumed most of the USEEOC's resources, leaving insufficient funds for enforcement.⁴⁴ A more persuasive explanation is the conflict of interest in the equality commission taking a neutral position during the complaint handling and complaint resolution phases, and then playing an advocacy role once it decides to assist the complainant.⁴⁵ This is not so much of a problem in the United States because the USEEOC does not assist the complainant until the complainant decides to litigate, by which time the Commission's role as a neutral facilitator has ended. In the United Kingdom and Ireland, assistance is available once the complainant decides to lodge a complaint. This is the model recommended for Australia. It would be impractical for a member of staff to advise and assist the complainant, while another served as the Conciliator and attempted to resolve the complaint. Therefore, separating the functions within the same institution is not the preferred option. If the equality commission is not responsible for handling or conciliating complaints, there will be no expectation that it will behave neutrally. It can then assume an enforcement role without any conflict of interest.

The remaining discussion concentrates on the assistance work conducted by the overseas equality commissions and argues that it is important to take a strategic approach to enforcement. Complainant assistance is an activity that most Australian legislatures have not contemplated to date. Since it is the key component of the overseas equality commissions' enforcement work, it is worth examining in-depth, particularly in light of the Commonwealth government's current review of federal anti-discrimination legislation.⁴⁶

D Providing Assistance – Why Take A Strategic Approach

The primary manner in which the overseas equality commissions enforce anti-discrimination law is by assisting complainants to resolve their discrimination complaint. The extent of the assistance provided depends on the circumstances of the case and the funding available. For example, the IEA grants assistance in stages, and reviews the level of assistance as the complaint progresses. Initially, complainants assisted by the IEA only receive advice and help with lodging their complaint at the Equality Tribunal. If the IEA determines that the case is worth pursuing, it will grant further assistance to represent the complainant at the Tribunal.⁴⁷ The likelihood of success at hearing is part of this assessment. The IEA also considers the cost of proceedings, the backlog of cases, the resources available to the Authority and what the Tribunal is likely to order.⁴⁸

44 See below n 59.

45 See South Australian Government, above n 13.

46 Robert McClelland, Attorney-General and Lindsay Tanner, Minister for Finance and Deregulation, 'Reform of Anti-Discrimination Legislation' (Media Release, 21 April 2010).

47 Interview with Carol Anne Woulfe, Solicitor, Equality Authority (Dublin, 26 September 2007). See also IEA, *Annual Report 2006 (2007)* Appendix 5.

48 IEA, *Annual Report*, above n 47. See also IEA, *Current Criteria for Section 67 Representation* <<http://www.equality.ie/index.asp?locID=14&docID=9>>.

The equality commissions initially assisted complainants on an ad hoc basis. There are two main criticisms levelled at this type of approach: firstly, happening upon a landmark case is a matter of chance; and secondly, the equality commission can be consumed by such work and lose focus on wider objectives. After examining these criticisms, this section shows that they can be overcome by taking a strategic approach. It draws on the experience of the UKDRC, which successfully introduced a program of strategic enforcement of disability discrimination law.

1 Criticisms of Providing Assistance on an Ad Hoc Basis

The first criticism is that assistance on an ad hoc basis can end up being a lottery. Colm O'Conneide, Lecturer at the Faculty of Laws, University College London, described this as a search for 'a needle in a haystack'.⁴⁹ By assisting complainants on an ad hoc basis, the equality commission must frame its strategy around the type of complaints brought to it. It is also unlikely that the equality commission will happen upon a landmark case using an ad hoc approach.

The second criticism of assistance work is that it can easily become the equality commission's main work, its 'bread and butter'.⁵⁰ The basis of this criticism is that focusing on assisting complainants on an ad hoc basis can stretch the equality commission's resources and cause it to lose focus on its wider objectives,⁵¹ such as its educational, promotional and policy work.⁵² To minimise this problem, the UKCRE and USEEOC implemented a strategy of providing assistance to obtain the maximum benefit from their resources. In its early days, the UKCRE attempted to assist everyone who had an arguable case⁵³ but from 2003, it required more than 'arguability' to provide assistance.⁵⁴ The UKCRE changed its focus to cases that would clarify the law, affect a group or promote legislative change.⁵⁵ The Commission regarded this approach as a more valuable use of its limited resources.⁵⁶ Congress invested the USEEOC with the power to litigate on behalf of complainants in 1972.⁵⁷ In doing this, the US Supreme Court said, Congress expected the USEEOC to bear 'the primary burden of litigation'.⁵⁸ However, during its lifetime, the USEEOC has been preoccupied with its

49 Interview with Colm O'Conneide, Lecturer, University College London (London, 15 September 2007).

50 O'Conneide, 'The Commission for Equality and Human Rights', above n 28, 150.

51 The British government was concerned that this would happen to the UKEOC. See quotes from its White Paper which preceded the introduction of the SDA(UK) and UKEOC, cited in Nick O'Brien, 'The GB Disability Rights Commission and Strategic Law Enforcement: Transcending the Common Law Mind' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe* (Hart, 2005) 249, 250.

52 *Ibid.* See, for example, the variety of such work undertaken by the UKDRC in addition to assisting complainants.

53 Hepple, above n 43, 110.

54 UKCRE, *2003 Annual Report* (2004) 19.

55 *Ibid.*

56 The UKCRE took on responsibility for the race equality duty at this time and part of its strategy was to test it. Its new Chair, Trevor Phillips, also preferred to concentrate resources on 'softer' approaches, such as developing codes of practice for industry and implementing the race equality duty: Hepple, above n 43, 110.

57 *Equal Employment Opportunity Act of 1972*, Pub L No 96-261, 86 Stat 103.

58 *General Telephone Co of The Northwest v EEOC* 446 US 318, 326 (1980).

complaint handling responsibilities. Due to the resources this consumes, the USEEOC has been criticised for not being an enforcement agency.⁵⁹ To address this, in 1996 it adopted a vision of strategic enforcement by implementing its National Enforcement Plan.⁶⁰ The Plan introduced a strategy for the USEEOC's enforcement role and defined criteria for selecting which charges to litigate.⁶¹ The purpose of this Plan is to ensure the most effective use of the USEEOC's resources by directing funds to where they have the potential to yield the greatest results.⁶² The USEEOC's enforcement priorities apply across its work, including its power to act as an *amicus curiae*.

2 The Benefits of Taking a Strategic Approach

An equality commission has limited resources. It is not possible for it to assist every meritorious case, so a certain degree of filtering is required anyway. However, rather than assisting complainants on an ad hoc basis, the equality commission can develop a strategy behind the assistance it provides. There should be a reason for the equality commission to select certain complaints rather than, in Nick O'Brien's words, get 'every drop of justice from the orange'.⁶³

The UKDRC offers an example of successfully using what is termed 'strategic enforcement'.⁶⁴ As the 'youngest' of the British equality commissions, the UKDRC benefited from assessing the successes and failures of the older commissions and

59 The USEEOC has experienced large backlogs of charges, which was a record high of more than 100 000 charges in 1995. For this reason it has been criticised for becoming a charge-handling agency rather than an enforcement one; Green contends that this is due also to the political nature both of the agency and of its funding: Michael Z Green, 'Proposing a New Paradigm for EEOC Enforcement After 35 years: Outsourcing Charge Processing by Mandatory Mediation' (2001) 105 *Dickinson Law Review* 305, 309–10. See also Chi-hye Suk, above n 27, 468. Funding cuts have limited the USEEOC's enforcement activities and forced it to focus on charge processing, something the USEEOC has also acknowledged: see USEEOC, *US Equal Opportunity Commission National Enforcement Plan* (1997) <<http://www.eeoc.gov/eeoc/plan/nep.cfm>>.

60 USEEOC, *US Equal Opportunity*, above n 59. It also implemented the Priority Charge Handling Procedure in 1995 to address the backlog of charges. See generally USEEOC Office of the General Counsel, 'Introduction to Commission Policies' in *Regional Attorney's Manual* (April 2005) <<http://www.eeoc.gov/eeoc/litigation/manual/>>; Paul M Igasaki and Paul Steven Miller, *Priority Charge Handling Task Force Litigation Task Force* (Report, USEEOC, 1998) VI; Theodore J St Antoine, 'Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?' (1998) 15 *TM Cooley Law Review* 3, 8.

61 Local Field Offices produce Local Enforcement Plans, which are consistent with the National Plan and directed at the needs of the local community: USEEOC, *US Equal Opportunity*, above n 59, I.

62 *Ibid* II.

63 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007).

64 The academics the author interviewed in the United Kingdom praised the UKDRC and its success in this area. See also opinions of commentators in the UKDRC's final publication: see, eg Michael Rubenstein, 'Why the DRC's Legal Strategy Succeeded' in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 11. See also the external recognition the UKDRC received: Agnes Fletcher and Nick O'Brien, 'Disability Rights Commission: From Civil Rights to Social Rights' (2008) 35 *Journal of Law and Society* 520, 534 n 58.

taking them into account when it developed a strategic approach to enforcement.⁶⁵ Reflecting on the UKDRC's work five years into its operation, the Commission's Director of Legal Services, Nick O'Brien, summarised the importance of taking a strategic approach:

The aspiration, in the provision of legal services, must be that every case really counts as a significant contribution to the broader strategic agenda. By targeting particular groups, sectors or issues, by seeking clarification of technical obscurities in the higher appellate courts, and by intervening in public law actions that lie at the edge of, or even outside, the primary legislation of which the commission is custodian, an equality commission can bring an extra, and invaluable, 'public interest' dimension to the pursuit of litigation.⁶⁶

The UKDRC's experience offers an informative example of how an equality commission which is not a gatekeeper for complaints can still access suitable complaints and implement its enforcement strategy.⁶⁷ The UKDRC established a phone advice line for complainants⁶⁸ and for complainants in non-employment related matters who sought a referral to conciliation.⁶⁹ The helpline became a source of strategic complaints. Nick O'Brien said that the UKDRC tried to catch the 'good complaints' before they were referred to conciliation⁷⁰ — once the issues raised in the complaint were defined, the Commission determined whether it could serve as a test case. If not, the complaint was referred to conciliation.⁷¹ The UKDRC also accessed complaints through other people and organisations working in the area. When the UKDRC developed its strategic approach to enforcing the *Disability Discrimination Act 1995* (UK) ('DDA(UK)') it sought

65 The UKEOC did not begin with a litigation strategy. In its first years, its approach was ad hoc and cases were assisted if their potential to deliver broader change was recognised: Barnard, above n 28, 263. By the mid 1980s, coinciding with the advent of the Conservative government, it started taking a strategic approach to the cases it assisted, as discussed in Part III.

66 O'Brien, 'The GB Disability Rights Commission', above n 51, 253–4. On the UKDRC's strategy see also Nick O'Brien and Caroline Gooding, 'Final Reflections' in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 151, 152; UKDRC, 'Securing Legal Rights in Practice for Disabled People' (Legal Bulletin, December 2001) 3 <<http://www.leeds.ac.uk/disability-studies/archiveuk/DRC/Legal%20Bulletin%20Issue%201.pdf>>; Pauline Hughes, 'Intervention — An Exciting Tool for Tackling Discrimination' (Legal Commentary, UKDRC, 1 February 2005).

67 Cf the UKEOC which was not as proactive. As at 1995, the UKEOC had not advertised for any suitable cases; it relied on potential complainants to approach it: Barnard, above n 28, 271.

68 The helpline took approximately 100 000 calls each year: Nick O'Brien, "'Accentuating the Positive": Disability Rights and the Idea of a Commission for Equality and Human Rights' (Speech delivered at the Industrial Law Society, St Catherine's College, Oxford, 10 September 2004) <<http://www.leeds.ac.uk/disability-studies/archiveuk/DRC/speeches%2020042.pdf>>. The UKDRC was not the only one to operate an advice line. The UKCRE operated an information and assistance phone line and the ECNI has a phone advice line for individuals. Complainants seeking assistance from the IEA can write to it or they are referred to its legal section having sought information from its Public Information Centre.

69 Unlike the older British equality commissions, the UKDRC's founding legislation empowered it to make arrangements for the provision of conciliation for complaints about goods, facilities and services, and education: DRCA s 10 amending *Disability Discrimination Act 1995* (UK) c 50, s 28. Complainants could only utilise conciliation if the UKDRC referred them.

70 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007).

71 Ibid.

assistance from lobbyists and lawyers to determine the type of litigation to become involved in. In turn, they referred complaints which suited this strategy to the UKDRC. Other sources of relevant complaints were NGOs and public interest groups. Lawyers also brought appeal cases to the UKDRC and if they fitted the strategy, the UKDRC would fund them.⁷² By actively seeking suitable complaints, the UKDRC could match appropriate complaints to its strategy, rather than having to frame the strategy around the complaints brought to it.

A strategic approach overcomes the two criticisms levelled at assistance work, as described above. Rather than responding to the complaints brought to the equality commission's attention on an ad hoc basis, the commission uses its established strategy as a guide for choosing appropriate complaints to assist and channelling its resources in the most effective way. As the examples in Part III show, the overseas equality commissions use their assistance function as part of a multi-pronged strategy to change and develop the law. For instance, the UKEOC and UKDRC decided the aspects of the law that they wanted to challenge and develop. From this, they determined the type of complaints they needed to access to achieve this.⁷³ As part of a strategic approach, it is therefore important for the equality commission to identify legal battlefields and evaluate and update them regularly to ensure that it is fighting discrimination on the most relevant fronts.

III THE USE MADE OF ASSISTED COMPLAINTS

The criteria used by the overseas equality commissions to decide which complaints to assist are summarised as complaints that: may result in a decision that will affect more than the individual complainant and apply to the group in question;⁷⁴ are about areas of the law that require clarification from a higher court;⁷⁵ may encourage the legislature to amend the law;⁷⁶ are on appeal and fall within the overall strategy;⁷⁷ highlight topical issues of concern to a group;⁷⁸ or maintain the law's profile and show that the law is being used and enforced.⁷⁹ What is common to each criterion is that the equality commissions seek complaints that will have an impact beyond the individual. By generating an outcome that affects

72 Ibid. The UKEOC did the same when it needed cases to take to the European Court of Justice, as discussed in Part III. The UKEOC advertised in trade journals, seeking complaints that fitted its litigation strategy: Karen J Alter and Jeannette Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) 33 *Comparative Political Studies* 452, 463.

73 See further discussion in Part III.

74 See, eg, UKCRE, *2003 Annual Report*, above n 54; USEEOC, *US Equal Opportunity*, above n 59, III.

75 The UKCRE could provide assistance 'if the complaint raised a question of principle or if it was unreasonable to expect the complainant to deal with it on their own due to its complexity, their position in relation to the respondent, or any other special consideration': RRA(UK) s 66(1)(b). SDA(UK) s 71(1) is the same, as is the ECNI's policy: ECNI, 'Policy for the Provision of Legal Advice and Assistance' (Policy Document, June 2010) 2–4.

76 Eg the UKCRE, *2003 Annual Report*, above n 54. See also the discussion of the UKEOC in Part III.

77 See discussion of the UKDRC in Part III.

78 See discussion of the UKDRC in Part III.

79 See discussion of the ECNI in Part III.

a group or by changing the law, the equality commissions use their assistance work for maximum impact. Part III presents examples of how the overseas equality commissions have used assisted complaints to achieve different ends.⁸⁰ The purpose of each example is to illustrate that the equality commission's involvement contributed to developing the law and helped to secure an outcome which benefited the wider community, not only the individual. Based on these examples, Part IV proposes why it would be valuable for the Australian equality commissions to assist complainants in a strategic way.

A Developing the Law through Strategic Litigation

1 The UKEOC's European Litigation

Through its assistance work, the UKEOC played a key role in developing British anti-discrimination law. The UKEOC was most successful at doing this during the era of the Conservative Thatcher and Major governments⁸¹ when it was faced with a government hostile to its agenda and to the development of gender equality laws.⁸² Initially, the UKEOC engaged in lobbying the government. For example, it attempted to persuade the government to raise the ceiling on compensation awards in sex discrimination complaints.⁸³ After years of lobbying failed, the UKEOC helped fund an appropriate case to change this law, which ultimately reached the European Court of Justice ('ECJ').⁸⁴ The UKEOC's approach was to begin with a domestic litigation strategy and appeal unfavourable court decisions. If that was unsuccessful, the Commission would ask domestic courts to refer adverse decisions to the ECJ.⁸⁵ By 1995, the UKEOC and the then Northern Ireland Equal Opportunities Commission had funded 15 cases to the ECJ, which constituted one third of all references that the Court heard on equal pay and equal treatment in employment.⁸⁶ The UKEOC's strategy resulted in a number of landmark decisions, including removing the ceiling on compensation orders in sex

80 It is acknowledged that the equality commissions do not rely solely on litigation to change the law or achieve outcomes that benefit groups. Assistance work is part of a multi-pronged strategy, which includes lobbying the government to change the law.

81 Alter and Vargas describe the actors committed to gender equality in the country at that time as part of 'perhaps the most famous EC litigation success story': Alter and Vargas, above n 72, 454.

82 Ibid. The British government also sought to prevent further measures relating to equal treatment from being enacted at the European Union level during this time. See Linda Dickens, 'Beyond the Business Case: A Three-Pronged Approach to Equality Action' (1999) 9(1) *Human Resources Management Journal* 9, 11–12.

83 Alter and Vargas, above n 72, 463.

84 *Marshall v Southampton and South West Hampshire Area Health Authority* (C-271/91) [1993] ECR I-4367.

85 Any British court can send the ECJ a question and its decisions bind both the British and other European legal systems. It is acknowledged that the Australian equality commissions cannot duplicate this approach because Australia does not have an equivalent regional judicial body but this approach could be emulated by appealing cases to the High Court. See Part IV below.

86 Barnard, above n 28, 254. Gay Moon said, 'at the time, we [Britain] got a reputation in Europe for taking discrimination cases, whereas other countries had reputations for taking tax cases': Interview with Gay Moon, Head of the Equalities Project, JUSTICE (London, 18 September 2007).

discrimination complaints⁸⁷ and shifting the burden of proof to employers once the employee had established a difference in the rate of pay for two jobs of equal value.⁸⁸ The UKEOC then introduced the decisions into British law by supporting domestic cases relying upon the ECJ's decisions⁸⁹ or using European law to strike down domestic law through judicial review proceedings.⁹⁰ If a decision meant that the *Sex Discrimination Act 1975* (UK) ('SDA(UK)') had to be changed, lobbyists would attempt to persuade the government to amend the RRA(UK) as well.⁹¹ Drawing upon the UKEOC's success, trade unions mounted a similar litigation strategy,⁹² as did public interest lawyers, interest groups and law centres.⁹³

2 Strategic Enforcement by the UKDRC

The UKDRC is an example of an equality commission that successfully engaged in 'strategic enforcement'.⁹⁴ By the time the UKDRC was established, disability discrimination legislation had been in operation in Britain for five years.⁹⁵ This meant that the UKDRC could evaluate the stage of development of the law, ascertain what parts of the legislation were not being used and determine which aspects needed to be clarified and what principles it wanted to test in higher courts.⁹⁶ For example, when the UKDRC was established, the law was being used in the area of employment, primarily because there was an established system for conciliating and hearing such matters,⁹⁷ but there was less use of the law in the area of goods, facilities and services.⁹⁸ The UKDRC's strategy included

87 *Marshall v Southampton and South West Hampshire Area Health Authority* (C-271/91) [1993] ECR I-4367.

88 *Enderby v Frenchay Area Health Authority* (C-127/92) [1993] ECR I-5535.

89 ECJ decisions are unenforceable in British law. Enforcement by a domestic court is the only method of obtaining compliance: Alter and Vargas, above n 72, 460.

90 See, eg, *R v Secretary of State for Employment; Ex parte Equal Opportunities Commission* [1995] 1 AC 1 (HL) which relied on the ECJ's strict standard of 'justification' in *Bilka-Kaufhaus v Weber von Hartz* (Case 170/84) [1986] ECR I 60 to strike down an indirectly discriminatory workplace policy. Barnard provides other examples: see Barnard, above n 28, 264–6.

91 Interview with Gay Moon, Head of the Equalities Project, JUSTICE (London, 18 September 2007).

92 Alter and Vargas, above n 72, 458–60.

93 Interview with Gay Moon, Head of the Equalities Project, JUSTICE (London, 18 September 2007).

94 See text accompanying n 65.

95 The DDA(UK) was enacted in 1995 without an enforcement body, partly due to the hostility the two existing equality commissions had encountered. In 1997, the Blair Labour government was elected and art 13 of the European Commission Treaty was introduced, both of which changed the political environment and paved the way for the UKDRC to be established. See generally Tufyal Choudhury, 'The Commission for Equality and Human Rights: Designing the Big Tent' (2006) 13 *Maastricht Journal of European and Comparative Law* 311, 311–2.

96 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007). See also O'Brien, 'The GB Disability Rights Commission', above n 51, 251 et seq.

97 ACAS and the Employment Tribunals respectively. Non-employment discrimination complaints are dealt with by the County Courts in England and Wales and the Sheriff Court in Scotland.

98 In the first 19 months that the DDA(UK) was operative, only nine cases came before the County Courts: Sandra Fredman, *Discrimination Law* (Oxford University Press, 2002) 169. The reasons for this include that these courts are costly, procedurally complex and damages are low: Sandhya Drew, 'The DDA and Lawyers: DDA Representation and Advice Project' in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 74, 76.

developing the law in these under-utilised areas.⁹⁹ Within its first three years of operation, the UKDRC had assisted 164 cases and 56 of them related to goods, facilities and services.¹⁰⁰

The UKDRC saw itself as a 'guardian' of the DDA(UK)¹⁰¹ and thought it was therefore important that it was not associated with any 'bad cases'¹⁰² — those that may be lost at first instance or which may develop the law in an unhelpful way.¹⁰³ The UKDRC sought to challenge damaging decisions and moderate the impact of the law.¹⁰⁴ The UKDRC also pioneered the approach of an equality commission intervening in litigation in Britain,¹⁰⁵ but it used its intervention function sparingly, as one component of its overall strategy.¹⁰⁶ The UKDRC intervened in cases that highlighted an issue relevant to the disabled community and when it could 'bring an added dimension to the issues in question which the parties cannot'.¹⁰⁷

B Obtaining Wider Remedies

The equality commission's involvement in a case often means it can negotiate a remedy that benefits other members of the community, not just the individual complainant. For example, when the IEA assists a complainant, it seeks an order requiring the respondent to change their practices or policies. To fulfil its mandate of fighting discrimination the IEA sees it as necessary to obtain an outcome which has an impact beyond compensating the individual.¹⁰⁸ The ECNI has a similar approach, as discussed below.

When the USEEOC litigates a charge on behalf of a complainant, it is considered to be acting in the public interest, so the Commission will not agree to keep the matter confidential and it seeks wide remedies. If the USEEOC settles a charge, it insists on doing so with a consent decree. This is a public document, filed in federal court and the court retains jurisdiction. The terms of the consent decree

99 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007). See also O'Brien, 'Accentuating the Positive', above n 68. Establishing a conciliation service for these complaints also contributed to increased use of this part of the legislation.

100 O'Brien, 'The GB Disability Rights Commission', above n 51, 252.

101 Rubenstein, above n 64, 12.

102 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007).

103 Cases which would potentially set an 'unfortunate' precedent in the disability rights jurisdiction were sent to conciliation so that the complainant could still receive redress: Margaret Doyle, 'Enforcing Rights Through Mediation' in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 57, 59.

104 See, eg, below IV(D) for a discussion of *Jones v The Post Office* (2001) IRLR 384.

105 Rubenstein, above n 64, 12.

106 See, eg, the UKDRC's intervention as a third party in *The Queen (On the Application of (1)A (2) B) v East Sussex County Council* [2002] EWHC 2771 (Admin).

107 Hughes, above n 66. The assistance of the UKDRC in providing the court with expertise was noted for example by Munby J in *Burke v The General Medical Council* [2004] EWCA Civ 1879 (Admin) [34].

108 Interview with Carol Anne Woulfe, Solicitor, Equality Authority (Dublin, 26 September 2007).

vary depending on the circumstances of the complaint. The USEEOC usually seeks employee training on equal opportunity laws and requires employers to develop an equal opportunity policy. If one exists, the USEEOC will review it and ensure that the policy is distributed to all employees. The Commission seeks a requirement that the USEEOC's posters are displayed in the workplace, along with a notice that the lawsuit was settled. It may also seek a monitoring role and require the employer to report to the Commission or regularly provide it with information, such as hiring data.¹⁰⁹ The USEEOC publicises the terms of the consent decree by issuing a media release for all charges it files and settles.¹¹⁰ It sees publicity as playing an important part in educating potential complainants and other employers.¹¹¹

A well publicised¹¹² example from the USEEOC's New York District Office was a charge it filed against a well-known Manhattan restaurant, Restaurant Daniel.¹¹³ The charge arose as part of the USEEOC's inquiry into systemic discrimination in the restaurant industry: 'white' employees were primarily working in the 'front of house' as hosts and waiters (which are better paid positions), while 'people of colour' were predominantly working in the 'back of house', working as 'bussers' and washing dishes.¹¹⁴ In the complaint against Restaurant Daniel, the USEEOC litigated on behalf of eight Hispanic and Bangladeshi 'back of house' staff who claimed that they were discriminated against in their job assignments on the basis of national origin, and that they were victimised.¹¹⁵ The charge was settled with a consent decree in force for seven years, an unusually long term,¹¹⁶ which required the respondent restaurant to pay the complainants US\$80 000. The respondent was also required to: refrain from discriminating against an employee; distribute a non-discrimination policy; train its managers in federal equal opportunity law; display the USEEOC's posters and a remedial notice (as prescribed in the decree)¹¹⁷ in prominent places, such as where employee notices are posted; and allow the USEEOC to monitor and review its compliance with the consent decree by inspecting records or interviewing its employees.¹¹⁸

109 Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007).

110 See USEEOC, *US EEOC Press Releases FY 2010* <www.eeoc.gov/press/>.

111 Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007).

112 See, eg, Adam B Ellick, 'Boulud Settling Suit Alleging Bias at a French Restaurant', *The New York Times* (New York) 31 July 2007, *Metropolitan Desk*, 3.

113 *EEOC v Restaurant Daniel*, No. 07-6845 (SDNY, 2 August 2007).

114 Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007).

115 USEEOC New York District Office, 'Manhattan Restaurant to Settle EEOC National Origin Bias Suit' (Media Release, 31 July 2007).

116 In this instance, it was difficult for the respondent to negotiate as the New York Attorney-General was also investigating it, so it was in the respondent's interest to settle both claims simultaneously.

117 Prescribed in 'Exhibit B' of the Consent Decree: *EEOC v The 65th Street Restaurant LLC d/b/a/ Restaurant Daniel, and the Dinex Group* (2007) United State District Court Southern District of New York, Civil Action No 07CIV6845, <http://www.ag.ny.gov/bureaus/civil_rights/pdfs/Restaurant%20Daniel%20AOD%207-25-07.pdf>.

118 *Ibid.*

C “Delivering Equality on the Ground”

The ECNI is an interesting example of two aspects of assistance work: the ECNI assists general complaints as well as strategic ones; and, through its terms and conditions for providing assistance, it is able to secure outcomes that benefit other members of the community.

1 General and Strategic Complaints

The ECNI chooses to assist strategic complaints and straightforward ones, which are not legally uncertain,¹¹⁹ because it believes this approach is ‘delivering equality on the ground’.¹²⁰ Mary Kitson, Senior Legal Officer at the ECNI, said that through its assistance work, the Commission attempts to maintain a balance between testing and clarifying new grounds of discrimination, such as age and disability, and maintaining the profile of the older ones, such as pregnancy and religious discrimination.

The ECNI’s ability to assist general and strategic complaints is due to its comparatively large budget and the considerable resources it commits to enforcement.¹²¹ The greater resources available to the ECNI are evident when its budget, staffing numbers and population are compared with a similar equality commission, the IEA.¹²² In the 2006–07 financial year, the ECNI’s budget was approximately €8.7 million,¹²³ whereas the IEA’s 2007 budget was €5.6 million.¹²⁴ Therefore, the ECNI’s budget was 50 per cent more than the IEA’s. The ECNI

119 Some of the things the ECNI considers when deciding to grant assistance were noted at above n 75. It also considers the extent to which the complaint fits in with the Commission’s strategic objectives, and whether it is likely to raise public awareness; will have a significant impact; has the potential for follow-up by the Commission; and the cost of assistance is commensurate with the benefits to be gained: ECNI, ‘Policy’, above n 75, 3.

120 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007). There may have been less need for the ECNI to appeal uncertain cases to higher courts because the three British equality commissions were actively engaged in doing this and any decisions from higher courts affected the law in Northern Ireland. Quinlivan also says that for Irish anti-discrimination law to be effective, the IEA should take ‘a steady run of cases’ not just exceptional ones but this is not currently possible due to the IEA’s workload: Shivaun Quinlivan, ‘Report on Measures to Combat Discrimination — Directives 2000/43/EC and 2000/78/EC’ (Country Report: Ireland, 2007) 61. In late 2008, the IEA was subject to severe funding cuts: see below n 128.

121 This is due to the political circumstances in Northern Ireland which led to its creation, primarily the systemic discrimination suffered by the Catholic population. On its approach, Mary Kitson said ‘we think because we’re such a small jurisdiction, we’ve had so much historical problems with equality, it’s really important that that message gets out there’: Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

122 It is difficult to draw comparisons with the resources of the British equality commissions because they only dealt with one ground of discrimination and were responsible for a larger population. Further, their budgets were not equal; in their final years, the budgets of the UKDRC and UKCRE were twice that of the UKEOC: O’Cinneide, ‘The Commission for Equality and Human Rights’, above n 28, 144 n 7.

123 Based on the exchange rate of 1.2431 (as at 29 August 2008). The ECNI’s budget was £6 998 798: ECNI, *Annual Report & Accounts 2006–2007* (2008) 62.

124 See budget estimates in Quinlivan, above n 120, 67; Judy Walsh et al, ‘Enabling Lesbian, Gay and Bisexual Individuals to Access Their Rights under Equality Law’ (Report, ECNI and The Equality Authority, November 2007).

also had greater staffing resources over that period: it had 139 staff,¹²⁵ while the IEA had 51.¹²⁶ The ECNI deals with a much smaller population,¹²⁷ but it has a lot more resources to devote to them: the ECNI has approximately €4.02 per head of population, while the IEA has approximately €1.32.¹²⁸ The comparatively greater resources at the ECNI's disposal means not only can it concentrate on general complaints as well as strategic ones, it can assist a greater proportion of complainants than its counterparts: one in four complainants who apply for assistance from the ECNI receive it.¹²⁹ This is in stark contrast to the UKCRE, for instance, which assisted only 3.2 per cent of the employment complainants who applied for assistance in 2003.¹³⁰

2 Securing Wider Outcomes

The ECNI attempts to secure wider outcomes through its assistance work. To receive assistance, complainants must agree to two conditions.¹³¹ First, the complainant cannot settle the complaint confidentially. This is so that the ECNI can publicise the settlement. The ECNI publishes names and facts of complaints in its annual settlements publication¹³² and issues media releases upon settling a case.¹³³ The ECNI's aim is to raise awareness amongst the public and to highlight issues and outcomes.¹³⁴ Second, the complainant cannot settle the matter without the ECNI, and by extension the community, getting something out of it. For example, as part of the settlement of an employment discrimination complaint, the employer will be required to meet with the ECNI's Employment Development Division¹³⁵ within 12 weeks of the agreement to review their practices and procedures, change

125 ECNI, *Annual Report & Accounts*, above n 123, 49.

126 IEA, *Annual Report*, above n 47, 100; Quinlivan, above n 120, 67.

127 The population of Ireland is two and a half times the size of Northern Ireland. As at 2006, the population of Ireland was estimated at 4 239 848: Central Statistics Office Ireland, *Statistics* <<http://www.cso.ie/statistics/Population1901-2006.htm>>. As at 2006, the population of Northern Ireland was estimated at 1 741 619: Northern Ireland Statistics and Research Agency, *Population Statistics* <<http://www.nisra.gov.uk/demography/default.asp3.htm>>.

128 In late 2008, the Irish government announced budget cuts of up to 43 per cent and the IEA's CEO, Niall Crowley, resigned in protest: Carol Coulter, 'Equality Authority Chief Resigns Over Budget Cutbacks', *The Irish Times* (Dublin) 12 December 2008. He was followed by six board members: Anne-Marie Walsh, 'Five Resign From Board of Equality Watchdog' *Independent* (Ireland) 20 January 2009.

129 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007). The ECNI's budget for assistance was £270 903 in 2006–07: ECNI, *Annual Report & Accounts*, above n 123, 77.

130 The UKCRE received 1130 requests for assistance, constituting about 36 per cent of all race discrimination complaints. It granted full assistance to 28, limited assistance to nine, and no assistance to 1093: Hepple, above n 43, 109.

131 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007). Both are part of the ECNI's terms and conditions for providing assistance.

132 See, eg, ECNI, *Decisions and Settlements Review 2005–2006* (2006).

133 See, eg, ECNI, 'Settlement Allows Woman Back to Work in Belfast' (Media Release, 9 May 2008).

134 ECNI, *Complaint Assistance* <http://www.equalityni.org/sections/default.asp?cms=your%20rights_complainant%20assistance&cmsid=2_417&id=417&secid=2>.

135 This Division is 'responsible for the provision of equality support to employers. The Division aims to ensure that employers are facilitated to comply with equality legislation and that best practice is promoted': *ibid.* Its services are not means tested so any employer can obtain advice: Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

them if necessary and train their managers accordingly.¹³⁶ The terms of settlement will be made public. Mary Kitson said respondents can alleviate any negative publicity by informing the public that they are working with the ECNI to ensure that the situation does not arise again. On the rare occasions that the respondent fails to take the required action, the ECNI can sue.¹³⁷ Through this strategy the complainant receives compensation, while the ECNI negotiates something that will benefit a wider group and which delivers equality 'on the ground'.

IV THE VALUE OF THE EQUALITY COMMISSION ASSISTING COMPLAINANTS

The Australian equality commissions are predominantly concerned with complaint handling and conciliation. The majority cannot advise and assist complainants; those that can assist complainants do so to a limited extent. It is curious that most Australian legislatures chose not to invest the equality commissions with an assistance function, especially since this model was operating elsewhere when the Australian equality commissions were created.¹³⁸ One reason for the legislatures' hesitation could be the potential conflict of interest. Since all of the Australian equality commissions have a conciliation function, there is a potential conflict of interest if the equality commission can advise the complainant *and* it is required to facilitate conciliation. The South Australian government's comments support this.¹³⁹ For the purposes of this discussion, it is not necessary to explain the legislatures' behaviour conclusively. If the equality commissions are divested of their complaint handling and conciliation functions (and they are assumed by the tribunal or another institution), any potential conflict ceases to be a concern. This would mean that the equality commissions would be free to act as an advocate for the law and advise and assist complainants without any expectation that they will act impartially.

By investing the equality commission with an enforcement role, Dickens says that the state is indicating the importance of eliminating discrimination. The state is signifying that addressing discrimination is not solely the concern of the individual parties; it is in the public's interest too.¹⁴⁰ Based on the experience of the equality commissions in other countries, Part IV proposes five reasons it would be valuable for the Australian equality commissions to assist complainants and have a visible enforcement role: increasing access to justice; developing the law; maintaining the law's profile; increasing the threat of litigation; and so

136 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

137 Mary Kitson described an instance of a wheelchair user who was unable to access a shop and the retailer agreed to provide such facilities as part of the settlement. When it failed to do so, the ECNI sued. This emphasised the importance of the agreement: *ibid*.

138 The UKCRE replaced the Race Relations Board in 1976, so it pre-dates all of the Australian equality commissions. The UKCRE could assist complainants: see above n 35.

139 See above n 13.

140 Dickens, 'The Road is Long', above n 2, 475.

that the equality commissions become 'repeat players'. This is followed by an examination of some shortcomings of this type of work.

A Increasing Access to Justice

A person bringing a discrimination complaint in Australia faces many obstacles, such as cost and requiring legal advice to help them to navigate complex law and unfamiliar judicial procedures. It is because of these obstacles that many complainants choose to settle. Indeed, ADR is offered so that people can access justice but avoid dealing with the formal legal system and its complexities. By providing assistance, the equality commission could start to address some of these obstacles. The equality commission's assistance would increase access to justice by decreasing the financial burden on the complainants it assists and providing them with support.¹⁴¹ For example, the UKDRC chose to assist the most disadvantaged disabled people who were least likely to have access to justice and be able to enforce their rights.¹⁴²

Like the Australian equality commissions, the overseas equality commissions also provide general, informal advice about the law in response to inquiries.¹⁴³ However, it is their ability to provide informed advice, rather than general information, which is necessary for increasing access to justice. Graham O'Neill, Senior Legal Policy Officer at the UKCRE, distinguished between the UKCRE offering general information about the law on its website and over the phone and providing a complainant with informed advice about the merits of their complainant. He thought that having access to informed advice from the Commission had increased access to justice for race discrimination complainants.¹⁴⁴ However, by providing assistance, an equality commission should not assume the role of a law centre or Legal Aid provider.¹⁴⁵ Nor should its assistance be regarded as a substitute for the public provision of legal funding.¹⁴⁶ The equality commission must retain its strategic approach. Instead, the value of the equality commission taking on an assistance role is that it opens up another

141 Bob Ross, a complainant assisted by the UKDRC, said that he could not have pursued his case without the UKDRC's support due to the cost: Bob Ross, 'A Claimant's Perspective: Ross v Ryanair Ltd and Stansted Airport Ltd' in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 31, 32.

142 O'Brien refers to nine cases brought on behalf of people with learning difficulties and mental illness: O'Brien, 'The GB Disability Rights Commission', above n 51, 254.

143 See above n 68.

144 Interview with Graham O'Neill, Senior Legal Policy Officer, Commission for Racial Equality (London, 18 September 2007). See also comments by the UKCRE that changes to the provision of public legal aid which would mean lawyers could only spend five hours on a discrimination complaint are inadequate. Due to the complex nature of the law, a complaint requires specialist expertise: UKCRE, *Response to the Discrimination Law Review* (2007) 25–7.

145 See further O'Brien, 'Accentuating the Positive', above n 68.

146 There is still a need for increased legal funding for discrimination complaints, particularly as they are likely to be lodged by members of marginalised groups who are unlikely to have access to legal support, but this is not the role for an equality commission per se. The UKCRE, for instance, partly funded a network of Race Equality Councils who could also assist complainants. These Councils were local bodies that the UKCRE referred complainants to but they were separate from the UKCRE.

avenue for complainants in this area of law, which, at present, offers complainants little financial support.¹⁴⁷

B Developing the Law

Discrimination has been prohibited in Australia for over 30 years, yet a relatively small body of case law has developed in this time. The reason for this is that the vast majority of discrimination complaints settle or they are withdrawn prior to hearing so the courts have had limited opportunities to apply and interpret the legislation.¹⁴⁸ For the purposes of this discussion, it is not necessary to examine the reasons for this, only to recognise that the result is there are aspects of anti-discrimination law that the courts have not considered.

Anti-discrimination law is a relatively new area of law and its principles are still evolving. It is based on statutory rights, so it is not supported by a well-developed body of common law like 'older' areas, such as tort or equity. Guidance about the law's application comes from the statutes and their interpretation. Courts have had limited opportunities to provide this guidance over the last three decades, particularly the superior courts. The High Court has not considered the *Sex Discrimination Act 1984* (Cth), for example, nor has it considered age discrimination. Indeed, in the slightly more than 30 years that Australian law has prohibited discrimination, the High Court has substantively considered the legislation on only seven occasions.¹⁴⁹ Most of these decisions relate to disability discrimination.¹⁵⁰ Only one involved race discrimination¹⁵¹ and there is only one authoritative decision about the application of special measures.¹⁵² Although the State and Territory legislation is substantially similar to the Commonwealth's, the High Court has only considered the legislation in Victoria, Western Australia and New South Wales. A clear body of case law has not emerged from the High Court and a coherent body of jurisprudence from superior courts in the States and Territories has not filled this gap either. This means that there is little guidance for lower courts and tribunals about how to apply and interpret the law.¹⁵³

147 Discrimination complainants do not receive Legal Aid, for instance.

148 For example, the AHRC received 1779 discrimination complaints in 2006–07, yet the federal courts heard only 12 substantive matters in 2007. See generally Dominique Allen, 'Behind the Conciliation Doors Settling Discrimination Complaints in Victoria' (2009) 18 *Griffith Law Review* 778, 780 Table 1.

149 See generally *Gerhardy v Brown* (1985) 159 CLR 70; *Australian Iron & Steel v Banovic* (1989) 168 CLR 165; *Waters v Public Transport Corporation* (1991) 173 CLR 349; *IW v Perth* (1997) 191 CLR 1; *X v Commonwealth* (1999) 200 CLR 177; *Purvis v New South Wales* (2003) 217 CLR 92; *New South Wales v Amery* (2006) 226 ALR 196. This excludes a number of the High Court cases in which the procedural implications of anti-discrimination law have been considered: see, eg, *University of Wollongong v Metwally* (1984) 158 CLR 447; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245.

150 *Waters v Public Transport Corporation* (1991) 173 CLR 349; *IW v Perth* (1997) 191 CLR 1; *X v Commonwealth* (1999) 200 CLR 177; *Purvis v New South Wales* (2003) 217 CLR 92.

151 *Gerhardy v Brown* (1985) 159 CLR 70.

152 *Ibid.*

153 See generally Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases & Materials* (Federation Press, 2008) 28.

The small body of case law also affects the complaint resolution process. Decisions that make it difficult for the complainant to establish discrimination may influence a complainant's decision to settle, particularly if they have legal advice. The small body of decided cases gives the equality commissions and lawyers little authority for interpreting the law, meaning they are less certain about how the tribunal would decide a complaint. Finally, limited case law means that potential respondents and the wider community do not know what compliance requires.

There is great scope for an equality commission to institute a strategy to clarify untested principles and continue to develop the law. Since anti-discrimination law has been operating for over 30 years, the Australian equality commissions, like the UKDRC, could evaluate its stage of development and select principles to test in higher courts and unfavourable decisions to challenge. Two examples of unfavourable decisions which could be tested are *Victoria v Schou*¹⁵⁴ and *Purvis v New South Wales*.¹⁵⁵ In most jurisdictions,¹⁵⁶ to establish indirect discrimination the complainant is required to prove *inter alia* that the requirement, condition or practice in question was unreasonable.¹⁵⁷ 'Reasonableness' is the pivotal element on which the definition of indirect discrimination is centred: if the complainant cannot establish that the respondent's behaviour was unreasonable, it means that a requirement, condition or practice which would otherwise have constituted indirect discrimination is not unlawful. In *Victoria v Schou*, the Victorian Court of Appeal interpreted the reasonableness requirement narrowly, making it more difficult for the complainant to establish indirect discrimination.¹⁵⁸ In a direct discrimination complaint, the complainant must establish that a person of a different status ('the comparator') was or would have been treated differently than they were.¹⁵⁹ The High Court's decision in *Purvis v New South Wales* ('*Purvis*') complicated the already difficult process of identifying the comparator. The child complainant in *Purvis* suffered from a severe brain injury which caused violent behaviour and he was expelled from school. The question before the High Court was whether the manifestation of the child complainant's disability — his violent outbursts — were part of the disability and thus excluded from the comparison, or whether they were to be considered as part of the same or similar circumstances. The majority found that since the child's violent outbursts led to his expulsion from school, it would be artificial to remove them from the objective circumstances. They identified the relevant comparator as a student who engaged in the same violent behaviour but who did not have a disability.¹⁶⁰ The Court did not limit its reasoning to disability discrimination and *Purvis* has been applied

154 (2004) 8 VR 120.

155 (2003) 217 CLR 92.

156 The exceptions are indirect discrimination in Queensland and federal sex, disability and age indirect discrimination complaints: *Anti-Discrimination Act 1991* (Qld) ss 204, 205; *Sex Discrimination Act 1984* (Cth) s 7C; *Disability Discrimination Act 1992* (Cth) s 6(4); *Age Discrimination Act 2004* (Cth) s 15(2).

157 See, eg, *Equal Opportunity Act 1995* (Vic) s 9.

158 *Victoria v Schou* (2004) 8 VR 120, 128–31.

159 See, eg, *Equal Opportunity Act 1995* (Vic) s 8(1).

160 *Purvis* (2003) 217 CLR 92, 137 (Glesson CJ); see also at 185 (Gummow, Hayne and Heydon JJ).

in other contexts.¹⁶¹ The equality commission's strategy could include pursuing a line of cases which modify — and ultimately limit — the unfavourable impact of these decisions.

Following a strategic approach, the Australian equality commissions could also use the law in under-utilised areas and those which have caused difficulties. For instance, considering how difficult race discrimination complaints are to prove,¹⁶² this would be an ideal area to focus on. The equality commission could assist a range of strong race discrimination cases and develop the jurisprudence in this area. Australia has a long history of race discrimination and its effects are still felt, particularly by Indigenous peoples who suffer disproportionate levels of disadvantage compared with the non-Indigenous population. Assisting race discrimination complaints, particularly those made by Indigenous complainants, would highlight that race discrimination continues to be a problem¹⁶³ and it would develop the body of case law in this area.

It is worth noting, as part of this discussion, that appearing in litigation is another useful way the equality commissions can endeavour to develop the law. As noted in Part II, some of the Australian equality commissions already have an *amicus curiae* or an intervention power. If the equality commissions are to be advocates, rather than gatekeepers, it follows that they should all have such powers. Intervening in litigation relevant to discrimination and equality is considered to be a function incidental to the equality commission's mandate of addressing discrimination. It was for this reason that the House of Lords held that, although the Northern Ireland Human Rights Commission did not have the express power to intervene in litigation, intervention was a power incidental to the Commission's express duties and thus it could exercise it.¹⁶⁴ The benefits of litigation powers are that they enable the equality commission to raise broader issues which the individual parties are not concerned with and unlikely to have the resources to argue.¹⁶⁵ In addition, they enable the equality commission to

161 See, eg, *Zygorodimos v Department of Education and Training* [2004] VCAT 128 (3 February 2004) [51]–[58] (Deputy President McKenzie); *Howe v Qantas Airways Ltd* [2004] FMCA 242 (15 October 2004) [118].

162 See also Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535.

163 The ECNI continues to assist religious discrimination complaints for a similar reason — that the ongoing existence of this form of discrimination is highly relevant to that society. Likewise, highlighting the ongoing discrimination of Indigenous peoples is important in Australia if inequality is to be reduced.

164 *Re Northern Ireland Human Rights Commission* [2002] UKHL 25 (20 June 2002). Barry expresses the same opinion about equality commissions generally: Eilis Barry, 'Interventions and Amicus Curiae Applications, Making Individual Enforcement More Effective' in Dagmar Shiek, Lisa Waddington and Mark Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford University Press, 2007) 8.IE.20. Following the House of Lords decision, the United Kingdom equality commissions were more willing to intervene in litigation: McColgan, above n 29, 385.

165 For example, the UKCRE, UKEOC and UKDRC intervened in the Court of Appeal's decision *Igen v Wong* [2005] ICR 931 ('*Igen*'), in which the Court clarified the operation of a recent legislative amendment to the burden of proof in discrimination cases. The Court's interpretation of the operation of the shift in burden had implications for future complainants, but the complainants in *Igen* would not necessarily have had the expertise, the resources or the desire to make broader policy arguments, whereas the equality commissions could.

influence cases other than discrimination complaints which relate to equality and disadvantage.¹⁶⁶ The equality commission offers the court its expertise and brings its opinion of how the law should be interpreted and policy considerations to the proceedings. However, these powers should be exercised in keeping with the equality commission's overall strategy, which is how the UKDRC and USEEOC regard these powers.

C Maintaining the Law's Profile

The equality commission's assistance work is a useful way of maintaining the law's profile. The overseas equality commissions do this in two ways: by resisting confidential settlements; and by regularly releasing information about complaints into the public sphere. At this point, it is important to recall that the vast majority of discrimination complaints in Australia are not resolved through a court hearing; they are withdrawn or settled prior. The terms of settlement are usually confidential and the Australian equality commissions release very little information — not even in a de-identified form — about the type of complaints made or how they were resolved.¹⁶⁷ The promise of confidentiality will often be necessary to get the parties to the negotiating table¹⁶⁸ but it limits the law's development. Confidentiality restricts the available information about the conciliation process, meaning later conciliation participants do not have access to information, nor can the process deter would-be discriminators. The absence of information, even in a de-identified form, that the equality commissions make available compounds this problem. Most importantly, confidentiality masks the extent to which discrimination remains a problem in society.

1 Resisting Confidentiality

As discussed above, both the USEEOC and ECNI have strict policies regarding confidentiality: neither will agree to a confidentiality clause as part of a settlement. The equality commission's ability to do this rests on its stronger bargaining power compared to an individual acting on their own.¹⁶⁹ Mary Kitson said that over time respondents have come to accept that the ECNI will not agree to confidentiality.

166 See further O'Brien, 'Accentuating the Positive', above n 68, discussing how the UKDRC used the *Human Rights Act 1998* (UK) to overcome defects in DDA(UK).

167 For further discussion of the pros and cons of the prominence of confidentiality in this jurisdiction and the lack of information about complaints released by the equality commissions, see Dominique Allen, above n 148, 781–3.

168 According to Thornton, without confidentiality, respondents would not be prepared to be labelled as wrongdoers and complainants may be deterred from lodging a complaint: Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733, 740. See also comments by equality commission staff and lawyers on the importance of confidentiality: *ibid* 786.

169 Lisa Sirkin, Mary Kitson and Carol Ann Woulfe all commented on the equality commission's stronger bargaining position in this regard: Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007); Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007); Interview with Carol Anne Woulfe, Solicitor, Equality Authority (Dublin, 26 September 2007).

They also know that the Commission does not have to negotiate because, unlike an individual, it has the resources to run cases if necessary.¹⁷⁰

However, public settlements are not appropriate for all complainants or for all types of complaints and they may deter potential complainants.¹⁷¹ While non-confidential settlements should certainly be the starting position, a strict policy, like the USEEOC and ECNI have, is not preferred. The law's objectives would not be fulfilled if people were discouraged from applying for assistance because they feared publicity. It is for this reason that the IEA does not have such an aggressive policy as the ECNI. Carol Ann Woulfe, solicitor at the IEA, said this might deter those who genuinely need assistance from approaching the IEA.¹⁷² Although the IEA prefers that settlements are not confidential, it balances that preference with recognising that there are times when matters need to be confidential, even when that means the IEA cannot maximise their impact through publicity.¹⁷³ For example, in 2007, the IEA wanted to publicise the facts of a settled complaint because it highlighted issues surrounding the influx of non-Irish workers. In return for confidentiality, the respondent offered the complainant the maximum compensation the Equality Tribunal could award and the complainant agreed.¹⁷⁴

Whether or not to agree to confidentiality should be discretionary and flexible, according to the circumstances of the complaint. For instance, the equality commission may attempt to negotiate a clause which enables it to publicise some aspects of the complaint, such as the relevant industry or the outcome negotiated. Factors the equality commission may consider in assessing the need for confidentiality are: the nature of the discriminatory behaviour including its extent and whether or not it is systemic; whether the respondent is a 'repeat offender' and, if so, how previous complaints were resolved; and the respondent's willingness to effectively address the complaint in return for confidentiality, such as by taking wider, systemic action. On each occasion, it will be necessary to strike a balance between the complainant's needs and the community's needs and this should be a policy matter for the equality commission to decide.

170 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

171 For example, sexual orientation. Mary Kitson said that very few people came forward to make complaints about discrimination based on sexual orientation, partly because of the publicity attached both to settlement and hearing: *ibid.*

172 Interview with Carol Anne Woulfe, Solicitor, Equality Authority (Dublin, 26 September 2007).

173 Carol Ann Woulfe recalled a complaint about a local authority's failure to reasonably accommodate a mother and her autistic child. The case highlighted poor procedures and lack of disability awareness. The Tribunal ordered the authority to provide the mother with a house within a year, so its impact was potentially great. However, the mother thought it would be difficult for herself and the child if their names were made public so they were kept confidential: *ibid.*

174 *Ibid.* An order for compensation is capped under the *Equal Status Act 2000–2004* (Ireland) s 27 at €6349 and the *Employment Equality Act 1998–2004* (Ireland) s 82(4) at two years pay and €12 697 for someone who was not an employee.

2 Releasing Information to the Community

The overseas equality commissions publicise the complaints they assist, both identified and anonymously. For example, the UKDRC would issue a media release when it settled a complaint and after successful litigation,¹⁷⁵ as does the USEEOC.¹⁷⁶ The IEA publishes identified information about the cases it assists, including those which are settled, in its Annual Report¹⁷⁷ and the ECNI publishes an annual *Decisions and Settlements Review*. The Review includes identified facts and outcomes of all the complaints that the ECNI assisted during that period.¹⁷⁸ Releasing information about the complaints helps the equality commission to maintain the law's profile and increase the law's ripple effect by: showing that the law is being enforced, which may deter would-be discriminators; and by promoting awareness of the legislation, which may encourage other complainants to come forward. The latter is one reason the ECNI publicises the facts and outcomes of the complaints it assists. Mary Kitson said, 'if we publish outcomes of our cases people know, "oh that happened to me, I should complain"'.¹⁷⁹ Therefore, publicising settlements and outcomes shows that discrimination still exists, victims can obtain relief, and the law prohibits discrimination and it will be enforced.

C The Threat of Litigation

Currently, the Australian equality commissions undertake various promotional activities to encourage voluntary compliance with the law. For instance, the AHRC engages in education, research, media work and community outreach activities. However, the 'carrot' of voluntary compliance becomes more attractive to potential respondents if the equality commission also wields the 'stick' of enforcement. The USEEOC actually litigates very few charges,¹⁸⁰ but to strengthen its ability to settle charges, the Commission believes it is critical to have a 'credible and visible litigation program'.¹⁸¹ Lisa Sirkin, Supervisory Trial Attorney at the USEEOC's New York District Office, said that for some respondents the threat of a lawsuit is the best way to encourage compliance voluntarily:

175 See, eg, UKDRC, 'Appeal Court Rules Airport and Airline Jointly Responsible for Disabled Passengers' (Media Release, 21 December 2004); UKDRC, 'Jessops Pays Compensation to Disabled Man Who Couldn't Get into Store' (Media Release, 18 September 2007) <http://drc.uat.rroom.net/DRC/newsroom/news_releases.aspx>.

176 See, eg, above n 115.

177 See, eg, IEA, *Annual Report*, above n 47.

178 See, eg, ECNI, *Decisions and Settlements Review*, above n 132.

179 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

180 The Commission litigates less than 2 per cent of total charges in the New York District: Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007). As at 2002, nationally it litigated less than 300 cases of the approximately 80 000 charges that were filed: *EEOC v Waffle House Inc* 534 US 279, 290 (2002).

181 Igasaki and Miller, above n 60, III.

[Y]ou can do conciliation and all that, but ... some companies, some people are not going to look at you twice unless they know that you can bring them to court and it's going to cost them a lot of money and bad publicity.¹⁸²

Regulatory theorists, such as Braithwaite, argue that persuasion will be more effective in securing compliance when it is supported by punishment.¹⁸³ Braithwaite proposes a regulatory pyramid with persuasion at its base. This progressively escalates in stages if voluntary compliance is unsuccessful until it reaches punitive sanctions at the pyramid's apex.¹⁸⁴ Based on this idea, Hepple, Coussey and Choudhury developed an enforcement pyramid designed to regulate equal opportunities.¹⁸⁵ At the pyramid's base is persuasion, then education. Above them is a voluntary action plan to promote 'best practice'. This escalates to equality commission investigation, followed by it issuing a compliance notice for failure to comply with the commission's requests. At the upper levels are judicial enforcement and then sanctions. Withdrawal of government contracts or licences sits on the apex.¹⁸⁶

The discussion in this article has taken a narrow approach to enforcement, focusing on assistance, and ultimately litigation, as a means of enforcing the law. Primarily this is because assistance has been the principal means of enforcement used by the overseas equality commissions; they have faced political resistance to the idea of exercising their investigative functions.¹⁸⁷ Within the framework of this discussion, the upper levels of Hepple et al's enforcement pyramid are more relevant.

The regulatory approach suggests that introducing the 'stick' of enforcement via litigation may strengthen the appeal of the voluntary compliance mechanisms the Australian equality commissions already use. For this approach to be most effective, the threat of enforcement must be real and what compliance entails must be clear. The respondent must believe that a complaint may be made against them and that the equality commission will enforce it. In essence, this threat is what the USEEOC relies upon to encourage compliance, as the earlier comment from Sirkin demonstrates.¹⁸⁸ Similarly, Niall Crowley, the IEA's former Chief Executive Officer, writes:

182 Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007).

183 John Braithwaite, 'Rewards and Regulation' (2002) 29 *Journal of Law and Society* 12, 19.

184 Ibid 20, Figure 2, citing Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Socio-Legal Studies, 1995) 33.

185 Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework — Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, 2000) ch 3.

186 Ibid particularly 58–9, [3.6] and Figure 3.1. This approach is reflected in the enforcement activities of the FWO, as discussed in Part II. A modified version will be introduced in Victoria from August 2011: see *Equal Opportunity Act 2010* (Vic) pt 9. On the application of a regulatory approach to Australia, see Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work–Family Conflict' (2006) 28 *Sydney Law Review* 689.

187 See above nn 27–9.

188 See above n 182.

Employers and service providers need to be clear that where discrimination happens enforcement will follow. The legislation needs to be seen to be regularly enforced or it will fail to have any significant impact.¹⁸⁹

Further, encouraging voluntary compliance requires clear law. Sternlight writes that society needs ‘clear and public precedents to deter future wrongdoers and let persons know what conduct is permissible’.¹⁹⁰ Respondents need to know what compliance requires, so the equality commission needs to disseminate information about successful cases to increase awareness of what is permitted and what is prohibited. Alter and Vargas write that if a respondent knows that they could lose in court, they will be more willing to adjust their policies and practices voluntarily. They concur that the ‘credible threat ... [of litigation] can be a weapon in itself’.¹⁹¹ The threat of litigation relies on the equality commission’s much stronger bargaining power — the respondent knows that the equality commission has the resources to litigate if necessary, unlike most individuals.¹⁹² This explains why the overseas equality commissions are able to negotiate wider remedies when they settle an assisted complaint. For example, when the UKDRC settles complaints on behalf of individuals, in some instances it has secured wider remedies than a court could have ordered.¹⁹³ In those situations, the respondents voluntarily agreed to change their practices and enter into a binding agreement with the UKDRC¹⁹⁴ as part of settling the complaint rather than risk litigation.

D The Equality Commission Becomes a ‘Repeat Player’

Galanter has suggested that parties in litigation can be divided into two types — One-Shotters, who are involved in litigation only on occasion, and Repeat Players, who are involved in several court actions over time.¹⁹⁵ A complainant in a discrimination case is typically a One-Shotter: they expect the case to be their only experience of litigation, the stakes are high and the cost of enforcing their

189 Niall Crowley, *An Ambition for Equality* (Irish Academic Press, 2006) 44.

190 Sternlight, above n 34, 1478.

191 Alter and Vargas, above n 72, 464–5.

192 Interviews the author conducted with lawyers practising in discrimination law in Victoria revealed that some respondents resist settling complaints at conciliation because they are prepared to ‘call the complainant’s bluff’. They judge whether the complainant has the money to pursue the complaint and then take the risk that the complainant will not refer the complaint to court, knowing that even if they do, they can still settle before hearing: Dominique Allen, above n 148, 787–8.

193 For example, a university agreed to audit its policies and procedures in order to make course materials more accessible for disabled people in *Chan v Bradford University* [2004] (settled) and a retailer agreed to improve disability access in all of its stores within a set timeframe in *Jackson v Debenhams plc* [2006] (settled): reported in UKDRC, ‘In Brief: DRC Key Cases’ in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 116, 124–5.

194 The UKDRC could enter into voluntary binding agreements: DRCA s 5. It entered into 11 agreements between 1 April 2004 – 31 July 2007 as part of the settlement of a non-employment complaint: UKDRC, ‘In Brief: Statistical Analysis’ in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 137, 144.

195 Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95.

rights may outweigh the potential outcome.¹⁹⁶ Respondents are typically Repeat Players, for instance a large employer or government department. Typically, they have taken part in litigation before and probably will again, the stakes are low and they have the resources to pursue long-term interests.¹⁹⁷

If an equality commission regularly takes part in litigation, either through assisting complainants or appearing as a third party, it can develop the characteristics of a Repeat Player and experience the advantages Galanter identifies.¹⁹⁸ First, a Repeat Player has advance intelligence since they have taken part in similar litigation before. Therefore, they are already familiar with the arguments and practicalities of running a case. Second, Repeat Players develop expertise and have access to specialists. For example, the British equality commissions benefited from the continuous involvement of prominent academics and barristers in their legal assistance and litigation work.¹⁹⁹ This relates to a third advantage; Repeat Players have the opportunity to develop facilitative informal relationships with institutions.²⁰⁰ Fourth, Repeat Players can play the odds. Galanter argues that the stakes are lower for a Repeat Player than a One-Shotter, so the former can develop a strategy to maximise gains over a series of cases. This relates to the fifth and sixth advantages; the Repeat Player can play for changes to rules or precedent, as well as immediate gains, and it can play for changes to litigation or procedural rules.

An illustration of how the equality commissions can benefit from the advantages of being a Repeat Player is the line of cases pursued by the UKDRC to moderate the detrimental impact of a Court of Appeal decision.²⁰¹ In *Jones v The Post Office*²⁰² (*Jones*'), the Court of Appeal examined the justification defence to a direct discrimination complaint on the ground of disability. The Court found that there was a low threshold to establish the defence, making it easier for employers to escape liability.²⁰³ Realising the potentially negative impact of the *Jones* decision, the UKDRC developed a litigation strategy that attempted to moderate its impact. The Commission pursued what O'Brien describes as 'a consistent thread of argument in the higher courts'.²⁰⁴ This led the Commission to support a complainant in the first House of Lords decision to consider the DDA(UK), which ultimately limited the effect of the *Jones* decision.²⁰⁵ This example shows how the

196 Ibid 98.

197 Ibid.

198 Ibid 98–103.

199 Barnard, above n 28, 260. Barnard refers to the involvement of Lord Lester QC with the UKEOC: at n 32. Robin Allen QC also represented the British equality commissions on many occasions and was a specialist legal adviser to the UKDRC: Robin Allen, 'Strategic Litigation in Enforcing the Duty to Make Reasonable Adjustments', in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 15.

200 See, eg, above n 199. The equality commission may also develop relationships with community legal centres and other public interest law centres.

201 The UKEOC's strategy of taking a series of cases to the ECJ is another pertinent illustration: see above Part III(A)(1).

202 (2001) IRLR 384.

203 Ibid.

204 O'Brien, 'Accentuating the Positive', above n 68. O'Brien also discusses the ensuing cases that challenged *Jones* which were supported by the UKDRC.

205 *Archibald v Fife Council* [2004] IRLR 651.

UKDRC could ‘play the odds’ and utilise its resources to change a rule, whereas the One-Shotter’s attention will be on their immediate gain or remedy; they are not concerned with the operation of similar litigation in the future. It is for this reason, Galanter says, that he expects precedents to favour the Repeat Player: they expect to be involved in litigation again, so they are concerned with how the law operates and are more likely to appeal cases which will produce favourable outcomes.²⁰⁶

The body of anti-discrimination case law in Australia is relatively small. Much of it favours respondents who have the resources to appeal unfavourable decisions.²⁰⁷ Following Galanter’s reasoning, the equality commission could take advantage of being a Repeat Player and attempt to adjust the balance in the case law so that there are more outcomes favourable to complainants; the equality commission then becomes the Repeat Player who enjoys the advantage in litigation, rather than the respondent. An equality commission may enjoy a slightly modified version of Galanter’s advantages because in one way, it is an unusual Repeat Player. The equality commission must consider the complainant’s interests in addition to its strategic objectives. Accordingly, it may settle more cases than a typical Repeat Player. Settlement is generally an issue in strategic litigation, as considered below.

E Limitations of Assisting Complainants

Two criticisms of the equality commission engaging in assistance work were noted at the outset: assisting complainants can consume the equality commission’s resources and stumbling upon a ‘landmark’ case can be accidental. Taking a strategic approach to assistance work overcomes these two issues, as discussed. This section presents some of the shortcomings of assistance and raises some ethical issues that the equality commissions may face in assisting complainants.

First, it can be difficult to predict which complaints are ‘strategic’. The experience of some involved in this work is that it is often the seemingly ordinary complaints that later become strategic and they are not usually offered assistance.²⁰⁸ However, the equality commission could subsequently assist such cases once they reach the higher courts and are regarded as ‘strategic’. Second, there are limits to relying on litigation to develop the law. It is not guaranteed that a case will succeed, for instance, or that an outcome will be favourable. Nor is there any assurance that a successful case will result in favourable legislative reform. For these reasons, the equality commissions that used assistance strategically did not rely on it solely to change the law. They pursued litigation after other avenues failed. For example, the UKEOC began by extensively lobbying the Conservative government. It was only when that approach was unsuccessful that it began taking cases to the

206 Galanter, above n 195.

207 See generally Beth Gaze, ‘The Costs of Equal Opportunity’ (2000) 25 *Alternative Law Journal* 125, 126 discussing this in the federal context.

208 Interview with Gay Moon, Head of the Equalities Project, JUSTICE (London, 18 September 2007).

ECJ. The UKDRC also pursued other strategies and did not resort to litigation immediately.²⁰⁹ Therefore, the equality commission should not forgo its other law reform work, such as research, education and lobbying. Litigation and assistance thus forms part of a multi-pronged strategy which ultimately seeks to benefit marginalised groups.

Third, assisting complainants consumes resources. Even though the ECNI is well resourced in comparison to other equality commissions, on occasion its legal budget has been stretched.²¹⁰ Moreover, the equality commission's assistance and enforcement work are often the first things that are reduced if the institution's budget is cut.²¹¹ Budgetary problems were one reason the UKCRE wound back its assistance work in 2003 and introduced a targeted approach.²¹² Again, this highlights the importance of taking a strategic approach. To work within budgetary realities, the equality commission has to adapt its assistance work around its available funds by taking a strategic approach and determining the most effective use of its resource dollars.

Fourth, not every complainant will want their complaint to be the one that is pursued to the highest court. In most instances, this will require a long-term commitment and delay in receiving a remedy.²¹³ The complainant will have to give evidence and may be subject to media attention. The complainant has many things to consider before agreeing to receive the equality commission's assistance. Presumably, some will decide that the financial support and the equality commission's backing outweigh other considerations.

The fifth shortcoming is if the complainant settles. Not only does settlement prevent a precedent, the equality commission does not benefit from the resources it expends, financial or otherwise. None of the equality commissions considered in this article will prevent a complainant from settling; they accept this risk. The ECNI's approach moderates the risk by requiring the settlement agreement to include something that benefits persons other than the complainant. In this way, the Commission can justify its expended resources.

The two preceding shortcomings highlight the tension between the equality commission's desire to secure a precedent or remedy that benefits other members of the community and the complainant's desire to resolve the complaint expeditiously and appropriately. The equality commission must manage that tension and act in

209 The UKDRC engaged in lobbying political parties and parliamentarians in England, Scotland and Wales. See generally Fletcher and O'Brien, above n 64, 538. See also the discussion of *Coleman v Attridge Law* [2007] ICR 654 in Robin Allen, above n 199, 15.

210 ECNI, *Annual Report 2002–2003* (2004) 20–1.

211 For examples, most of the USEEOC's budget is allocated to fixed operating costs and any extra funding it receives is used for 'discretionary' items, such as enforcement, which are wound back if the budget is cut: Igasaki and Miller, above n 60, II.

212 UKCRE, *2003 Annual Report*, above n 54, discussed above Part II(D)(1).

213 See, eg, *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, where it took three years for the complaint to reach the High Court. In *New South Wales v Amery* (2006) 226 ALR 196, 11 years elapsed between the lodging of the complaint at the NSW Anti-Discrimination Board and the High Court hearing. *Victoria v Schou* (2004) 8 VR 120 involved two tribunal trials and a Supreme Court trial and it finally resolved almost six years after Ms Schou resigned her employment.

an ethical way that does not compromise the complainant or result in a conflict between the complainant's needs and the equality commission's interests. Therefore, in addition to developing criteria for which cases to assist, the equality commission should develop guidelines for resolving complaints. For example, it may be prudent for the equality commission's in-house lawyers to assist the complainant with the early stages of preparing and lodging their complaint and use external lawyers if ADR is unsuccessful so that the equality commission remains at arm's length from decisions about resolving the complaint. It would also be appropriate for the equality commission to make the complainant aware from the outset that it is interested in their case because of its strategic potential and it would prefer a systemic outcome, but ultimately the complainant bears the responsibility for how the complaint is resolved.

Finally, although enabling the equality commission to assist complaints would add a new dimension to enforcement in Australia, it does not move the law away from the individual complaints based system. The primary limitations of that system are that it is passive, retrospective and reactionary.²¹⁴ The law does not pre-empt discriminatory behaviour; rather, it offers a resolution after the fact. There is no obligation on employers or service providers to take anticipatory action to address policies or practices that could disadvantage certain groups; the law only requires the respondent to take action to remedy unlawful behaviour once a successful complaint is made. O'Conneide explains:

The individual enforcement model relies excessively on an approach that resembles sending a fire engine to fight a fire rather than preventing that fire in the first place. The existing formal legislative approach eliminates difference, not disadvantage.²¹⁵

O'Conneide's description highlights the need for a model which prevents the 'fire' by getting to the source of the 'flame'. This suggests that preventing discrimination is insufficient on its own; the law should also positively promote equality. That is the conclusion Britain reached after an individual complaints-based system failed to address systemic racism in the London Metropolitan Police Force.²¹⁶ Therefore, although investing the equality commission with an assistance role is valuable for

214 On the limits of anti-discrimination law, see generally Margaret Thornton, 'Revisiting Race' in Human Rights and Equal Opportunity Commission Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* (Australian Government Public Service, 1995) 81, 83–5; Colm O'Conneide, 'Beyond the Limits of Equal Treatment: The Use of Positive Duties in Equality Law' (Paper presented at Mainstreaming Equality: Models for a Statutory Duty, Equality Authority, Dublin, Ireland, 27 February 2003) 20–2; Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 370–3.

215 O'Conneide, 'Beyond the Limits', above n 214, 21.

216 See William Macpherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, Cm 4262-I (1999). As a result, Britain introduced a positive duty on public authorities to promote racial equality: RRA(UK) s 71, and, more recently, duties to promote equality on the grounds of gender and disability: SDA(UK) ss 76A, 76B, 76C; DDA(UK) ss 49A, 49D. A positive duty also operates in Northern Ireland: *Northern Ireland Act 1998* (UK) s 75. See also Fredman, 'Changing the Norm', above n 214; Colm O'Conneide, 'Positive Duties and Gender Equality' (2005) 8 *International Journal of Discrimination and the Law* 91.

the reasons proposed above, the limits of solely relying on a reactive and passive system to address discrimination must be acknowledged.

V CONCLUSION

The premise of this article is that the Australian equality commissions should discontinue handling discrimination complaints so that they are free to advise and assist complainants without any expectation that they will act neutrally. The article examined one enforcement method used by equality commissions in other countries — assisting complainants with resolving their complaint. This was chosen for discussion because to date equality commissions in Australia have not engaged in this work and it could be incorporated into the existing legal structure. Examples from other countries show how much can be achieved, legally and remedially, if the equality commission has the freedom — and also the resources — to take a strategic approach to enforcing and developing the law. By assisting individual complainants, the equality commission can tackle other instances of discrimination, strengthen and develop the law and increase the law's 'ripple effect' on other instances of discrimination.