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ADDRESSING DISCRIMINATION THROUGH INDIVIDUAL ENFORCEMENT: A CASE STUDY OF VICTORIA

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INTRODUCTION

Victoria was one of the first States or Territories to prohibit discrimination when it enacted the *Equal Opportunity Act 1977* (Vic). Continuing to lead the way, in 2010 Victoria overhauled its anti-discrimination law after an extensive community consultation process. The *Equal Opportunity Act 2010* (Vic) came into force in August 2011 and it stands as one of the most modern anti-discrimination laws in the country, with several innovative features including simplified definitions of discrimination, direct access to the tribunal for complainants, and a commitment to substantive equality.

Anti-discrimination laws are similar throughout Australia. They rely on the individual who has experienced discrimination to lodge a claim and enforce their rights. Most claims are settled confidentially through alternative dispute resolution or they are withdrawn. Consequently, very little is known about the nature of discrimination or how claims are resolved, and the body of case law that has developed over the last four decades is quite small.

In 2016 I was awarded a grant by the Victorian Legal Services Board to conduct research on the innovative mechanisms in the *Equal Opportunity Act 2010* (Vic) and to gather data about the resolution of discrimination complaints under the new system from key stakeholders. This report focuses on one aspect of that project — the process of resolving a discrimination claim. The report begins by setting the context for the introduction of the *Equal Opportunity Act 2010* (Vic) and outlining the research methodology. The main part of the report presents the research findings as they apply to each stage of the dispute resolution process, from the decision about which jurisdiction to use, to lodgement at the Victorian Equal Opportunity and Human Rights Commission and/or the Victorian Civil and Administrative Tribunal, through to hearing. The report concludes with suggestions for how the dispute resolution and enforcement system could be improved so that it can more effectively tackle discrimination and inequality in Victoria.

In addition to case law, the report draws on interviews conducted with lawyers in Victoria and staff at the Victorian Equal Opportunity and Human Rights Commission. I am extremely grateful to everyone who gave so generously of their time and participated in the project, and for their interest in its findings and in the future of Victoria's anti-discrimination law.

Particular thanks are due to Chris Kaias and Renee Burns who provided excellent research assistance, and to my colleagues Associate Professor Belinda Smith, Associate Professor Alysia Blackham, Dr Laura Hilly and Adriana Orifici for our fruitful discussions about Victoria's anti-discrimination law throughout the project. This research would not have been possible without the generous support of the Victorian Legal Services Board Grants Program. I am very grateful to the Grants Program for funding the project and for its interest in the research.

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1 HISTORICAL CONTEXT

Victoria's first anti-discrimination law prohibited direct discrimination on the basis of sex and marital status in the areas of employment, education, accommodation, and the provision of goods and services.¹ At the time, only New South Wales and South Australia had passed legislation prohibiting sex discrimination.² Commonwealth legislation had prohibited racial discrimination since 1975.³

Direct and indirect discrimination on the basis of impairment were added to the *Equal Opportunity Act 1977* (Vic) ('EOA1977') in 1982.⁴ The 1977 Act was replaced by the *Equal Opportunity Act 1984* (Vic) ('EOA1984'). Rather than listing attributes, that Act prohibited discrimination on the basis of a person's 'status' or 'private life'.⁵ A person's status was their sex, race, disability, marital, and parental status.⁶ A person's private life referred to whether or not they held a lawful religious or political belief or engaged or refused to engage in any lawful religious or political activities.⁷ Significantly, the Act also prohibited sexual harassment⁸ and indirect discrimination.⁹ The EOA1984 was replaced by the *Equal Opportunity Act 1995* (Vic) ('EOA1995') and the protected attributes were expanded to include age, carer status, industrial activity, lawful sexual activity, physical features, pregnancy, and personal association with someone who possesses one or more of the protected attributes.¹⁰ Later, breastfeeding, sexual orientation, gender identity, and employment activity were added.¹¹

The process of resolving complaints about discrimination has remained much the same over the last 40 years. The EOA1977 established the Office of the Commissioner for Equal Opportunity and the Equal Opportunity Board. Complaints were initially lodged with the Registrar of the Equal Opportunity Board and then referred to the Commissioner who was required to take 'all reasonable endeavours' to resolve the complaint through confidential conciliation.¹² If the complaint did not resolve, the Commissioner could refer it to the Board for hearing.¹³ Unlike a court, the Board was not bound by the rules of evidence¹⁴ and a legal representative required leave to appear.¹⁵ If it found discrimination had occurred, the Board could order the person to refrain from further unlawful acts, compensate the victim for any loss or damage suffered, and perform any acts necessary to redress the loss or damage suffered as a result of the contravention.¹⁶ The Board was also responsible for educating the community about the Act,¹⁷ conducting research into the Act's operation,¹⁸ and granting exemptions to the Act.¹⁹

In 1987 the Commissioner was given the power to initiate an investigation if they became aware of a discriminatory act of a serious nature against a group or class of people and lodging an individual complaint would not be appropriate.²⁰ The Minister's consent was required before an investigation could proceed.²¹ In 1993 the Commissioner was replaced by a five member Equal Opportunity Commission which was responsible for receiving and conciliating complaints.²² The Board's name was changed to the Anti-Discrimination Tribunal in 1995²³ and its functions were transferred to the Victorian Civil and Administrative Tribunal ('VCAT') when the tribunal was established in 1998.²⁴ In 2006, when the Equal Opportunity Commission was given functions under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), its name was changed to the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC').

¹ *Equal Opportunity Act 1977* (Vic) ss 16, 18, 25–27 ('EOA1977').

² *Anti-Discrimination Act 1977* (NSW); *Sex Discrimination Act 1975* (SA).

³ *Racial Discrimination Act 1975* (Cth).

⁴ Section 3 of the *Equal Opportunity (Discrimination against Disabled Persons) Act 1982* (Vic) which inserted s 27A into the EOA1977.

⁵ EOA1984 s 17.

⁶ EOA1984 s 4.

⁷ EOA1984 s 4.

⁸ EOA1984 s 20.

⁹ EOA1984 s 17(5).

¹⁰ EOA1995 s 6.

¹¹ *Equal Opportunity (Breastfeeding) Act 2000* (Vic) s 3; *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* (Vic) s 5; *Equal Opportunity Amendment Act 2007* (Vic) s 4.

¹² EOA1977 s 36.

¹³ EOA1977 ss 36–37.

¹⁴ EOA1977 s 45.

¹⁵ EOA1977 s 46(3).

¹⁶ EOA1977 s 40(2).

¹⁷ EOA1977 s 15.

¹⁸ EOA1977 s 15.

¹⁹ EOA1977 s 34.

²⁰ Section 5 of the *Equal Opportunity (Amendment) Act 1987* (Vic) which inserted s 41(2A) into the EOA1984.

²¹ EOA1984 s 41(2A).

²² *Equal Opportunity (Amendment) Act 1993* (Vic) ss 6–7A.

²³ EOA1995 s 180.

²⁴ Claims were initially heard in the Anti-Discrimination List, which is now known as the Human Rights List.

2 THE EQUAL OPPORTUNITY ACT 2010 (VIC)

A comprehensive review of the *EOA 1995* was conducted in 2008. Led by Julian Gardner, the review's terms of reference included examining options for a 'more tailored approach' to dispute resolution so that it could address systemic discrimination and discrimination claims that raise public interest issues.²⁵ Following extensive consultation with the community, the Gardner Review made 93 recommendations for how the Act could be improved, including changes to the dispute resolution model.²⁶

In the dispute resolution model proposed in the Review, the VEOHRC would continue to handle complaints but it was required to intervene early to resolve them. The Review recommended that the Commission offer a range of flexible dispute resolution services (from phoning or emailing a respondent to advise it about its obligations under the Act through to providing conciliation and mediation services) that would further the Act's objects. Significantly, the review recommended giving complainants direct access to VCAT without having to first lodge their claim at the VEOHRC. It also recommended that legal assistance and representation should be provided by a specialist external legal service, such as within Victoria Legal Aid or a single community legal centre.²⁷ All of these recommendations were implemented in Part 8 of the *Equal Opportunity Act 2010 (Vic)* ('*EOA2010*') except for the specialist external legal service. In 2011, the Victorian government provided funding to Victoria Legal Aid to establish an Equality Law Program as part of its Civil Justice program.²⁸ In addition, duty lawyers from Victoria Legal Aid attend directions hearings at VCAT each Monday and provide legal advice to unrepresented complainants.²⁹

3 RESEARCH METHOD

One of the objectives of this research project was to examine the changes that the *EOA2010* made to the dispute resolution model. Under the new model, complainants can make a direct application to VCAT to hear their discrimination or sexual harassment complaint without having to approach the VEOHRC first. The VEOHRC continues to provide dispute resolution services and it is required to provide those services as early as possible. There is a lack of information about why claims settle and what they settle for, so the study also gathered information about that aspect of the dispute resolution process.

Semi-structured interviews were conducted with solicitors and barristers in Victoria and staff at the VEOHRC, as set out in Tables 1–4. The interviews were conducted by phone or in person between August 2017 and April 2019. The research was approved by the Department of Justice (Victoria) Human Research Ethics Committee³⁰ and the Monash University Human Ethics Committee.³¹ The interview questions were designed to explore the participants' opinions and experience, and as such the data has no quantitative power. Its purpose is to provide qualitative evidence about the dispute resolution process and settlement outcomes.

TABLE 1: INTERVIEW PARTICIPANTS

Solicitors	19
Barristers	4
VEOHRC staff	12
Total	35

Lawyers

A combination of directly approaching participants and snow ball sampling was used to recruit the solicitors and barristers who participated in this project. Participants also suggested practitioners they knew with expertise in the field. 24 solicitors and 15 barristers were approached. Solicitors who represent either complainants or respondents were approached, as were solicitors from a range of legal practices. The barristers represented both parties.

²⁵ Department of Justice, Victorian Government, *An Equality Act for a Fairer Victoria: Equal Opportunity Review* (Final Report, June 2008) ('Gardner Review') 11.

²⁶ See Gardner Review, Chapter 3.

²⁷ Gardner Review, Recommendations 15, 16, 24, 31.

²⁸ Victoria Legal Aid, *Seventeenth Statutory Annual Report 2011–12* (Annual Report, 2012) 31.

²⁹ Victorian Civil and Administrative Tribunal, *Annual Report 2011/12* (Annual Report, 2012) 45 ('*VCAT 2011/12 Annual Report*').

³⁰ Project number: CF/16/23372.

³¹ Project number: 8648.

TABLE 2: PARTY SOLICITOR PRIMARILY REPRESENTED

Complainant	14
Respondent	5

TABLE 3: SOLICITORS BY TYPE OF FIRM

Community Legal Centre	13
Mid-Tier Firm	5
Top-Tier Firm	1

The group of lawyers who were interviewed is narrow and by no means comprehensive. Not every lawyer with expertise in anti-discrimination law in Victoria was invited to participate. Although solicitors located outside the Melbourne CBD were approached, most of the solicitors who participated were located in the CBD. Consequently, the views expressed are Melbourne focused and so the views of practitioners working in other locations in the state were not captured.

All of the solicitors and all except one of the barristers had experience with the *EOA2010* and the earlier legislation. All of the lawyers regularly represent parties to complaints lodged under the *EOA2010* so their comments provide a valuable insight into the operation of the dispute resolution process to date.

The group of barristers is small because discrimination work often forms a small part of a barrister's work — their primary practice area is industrial relations, public law or commercial law. Some barristers who were approached said that they are not often briefed in state claims, so they could not participate. It is worth noting that barristers usually become involved much later in the dispute process once the claim reaches VCAT, so their comments focused on that stage of the process.

VEOHRC Staff

The VEOHRC identified and approached suitable interview participants from its staff, and it provided facilities for the interviews to be conducted.

TABLE 4: VEOHRC STAFF

Legal Staff	4
Conciliator	5
Education	1
Policy	1
Other	1
Total	12

VCAT Mediators

VCAT was approached and invited to take part in the research in the form of permitting staff who provide dispute resolution services to be interviewed about the processes and methods that its mediators use to resolve claims, and to comment on the outcomes achieved at settlement. VCAT declined this invitation. It did, however, provide data about the volume of claims that are resolved through alternative dispute resolution and the rates of settlement (Table 9).

VCAT does not capture detailed information about the type of claims it receives and the attributes and areas they relate to. Data about the applications it hears, the type of cases it decides, and the remedies it has awarded (which are presented in Tables 10–15 and Figures 1–3) were prepared by the author.

Case Analysis

The interview data was supplemented by an examination of the 188 decisions that VCAT made under the *EOA2010* between the first decision in September 2011 until December 2018.

4 ENFORCING A DISCRIMINATION CLAIM

Anti-discrimination law relies on the individual who experienced discrimination for its enforcement. The first step in the enforcement process is for the individual to identify that the behaviour that they were subject to was unlawful discrimination. The second step is to decide to do something about that behaviour. Until 2011, complainants in Victoria had the choice of lodging a discrimination complaint at either the VEOHRC or the Australian Human Rights Commission ('AHRC').

The *EOA2010* introduced two significant changes to the dispute resolution model — complainants were given the option to bypass the VEOHRC and lodge their complaint directly at VCAT;³² and the VEOHRC is required to provide dispute resolution as early as possible and it must be voluntary.³³ The VEOHRC's complaint statistics over the last five years do not reveal a reduction in complaints or suggest they are being diverted to VCAT. The number of claims lodged directly at VCAT and the impact of this change is discussed below at 4.4.

In addition, the *Fair Work Act 2009* (Cth) ('*FWA*') came into force on 1 January 2010, further complicating the workplace discrimination landscape. Industrial relations law already prohibited an employer from terminating an employee on the basis of a protected attribute. The *FWA* expanded this protection beyond dismissal.³⁴ In addition, the *FWA* protects employees from adverse action if they lodge a complaint at the VEOHRC or AHRC or seek advice (for example, from a union) about whether or not they have a claim.³⁵ Under the *FWA* an employee is prevented from pursuing the same claim in multiple forums.³⁶

Consequently, there are now three avenues for addressing discrimination in the workplace,³⁷ and two for non-employment claims. In addition, a person who chooses to pursue a claim under the *EOA2010* has the choice of approaching the VEOHRC or VCAT first. The VEOHRC can decline to provide dispute resolution services if the matter has been dealt with by a court or tribunal, if it would be more appropriate for it to be dealt with by a court or tribunal, or if the person has initiated proceedings in another forum.³⁸

"When you're advising a national client [respondent], there are things that are different in different jurisdictions and it is nightmarish for those clients to ensure that they're properly compliant with the regulatory regime." (respondent solicitor)

4.1 CHOICE OF JURISDICTION

The first challenge a complainant may face is choosing a jurisdiction. This is a complex issue. Complainant solicitors identified the factors that they take into account when advising their clients, noting that in many instances, the facts will dictate which avenue the complainant is best to pursue. If the complainant has multiple causes of action under federal or state laws that will also be relevant. The other factors that the solicitors consider are any time limits imposed by the legislation, how quickly a conciliation session will be scheduled under each system, any differences in the Commonwealth and Victorian legislation (for example, the federal Acts still use the comparator test and religious discrimination is not prohibited), the onus of proof, and the cost (including the risk of an adverse costs order in the Federal Court).

"I think one of the difficulties is that when someone suffers harm in Victoria there's four or five avenues that they can go down and it's really hard to expect a lay person to correctly identify which one is the best for them and particularly if running one sort of claim might inadvertently have an adverse impact on another sort of claim, so it's a tough landscape in that sense." (VEOHRC staff)

³² *EOA2010* s 122.

³³ *EOA2010* ss 112, 118.

³⁴ *FWA* s 351.

³⁵ *FWA* s 340.

³⁶ *FWA* Part 6-1.

³⁷ Except for sexual harassment claims which the *FWA* does not prohibit.

³⁸ *EOA2010* s 116. The President of AHRC has similar powers: *Australian Human Rights Commission Act 1986* (Cth) s 46PH.

4.2 COMPLAINT LODGEMENT AND INVESTIGATION

Prior to lodging a complaint, a potential complainant can contact the VEOHRC in person, by phone, or electronically, for information about anti-discrimination law and the dispute resolution process. In 2017–18 the VEOHRC received 8,585 inquiries.³⁹ Not all inquiries lead to a formal complaint. Some people will resolve the matter informally or find that they need to approach a different agency.

The following Tables present data about complaints lodged at the VEOHRC over the last five financial years.⁴⁰ Table 5 shows that most complaints relate to employment and that, apart from 2014–15, there has been a drop in the number of complaints.

TABLE 5: COMPLAINTS RECEIVED BY THE VEOHRC

2013–14	2014–15	2015–16	2016–17	2017–18
2,693 (1,540 in employment)	2,871 (1,670 in employment)	2,103 (1,139 in employment)	1,906 ⁴¹ (1,074 in employment)	2,246 ⁴² (1,147 in employment)

Discrimination is prohibited on the basis of 18 attributes in the *EOA2010*, and each year the VEOHRC receives complaints about each of these attributes, though not necessarily in every area in which discrimination is prohibited. Each year, the most common attributes for complaints are disability, race, sexual harassment, sex, and age, as shown in Table 6. The most common area is employment, as shown in Table 7. The most common type of respondent is private enterprise, followed by state government.⁴³

TABLE 6: FIVE MOST COMMON ATTRIBUTES OF COMPLAINTS

	2013–14	2014–15	2015–16	2016–17	2017–18
Age	140	145	123	131	94
Disability	686	752	544	596	663
Race	296	307	196	110	207
Sex	162	235	195	172	226
Sexual harassment	205	183	170	131	156

³⁹ Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2017–18* (Annual Report, 2018) 14 (*‘VEOHRC 2017/18 Annual Report’*).

⁴⁰ Data was sourced from Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013/14* (Annual Report, 2014) (*‘VEOHRC 2013/14 Annual Report’*); Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2014/15* (Annual Report, 2015) (*‘VEOHRC 2014/15 Annual Report’*); Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2015/16* (Annual Report, 2016) (*‘VEOHRC 2015/16 Annual Report’*); Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2016/17* (Annual Report, 2017) (*‘VEOHRC 2016/17 Annual Report’*); *VEOHRC 2017/18 Annual Report*.

⁴¹ Includes complaints under the *Racial and Religious Tolerance Act 2001* (Vic).

⁴² Includes complaints under the *Racial and Religious Tolerance Act 2001* (Vic).

⁴³ Of the 883 respondents to complaints in 2017–18, 564 were from private enterprise and 128 were from a state government department or statutory authority: *VEOHRC 2017/18 Annual Report* 11.

TABLE 7: COMPLAINTS RECEIVED BY AREA

	2013–14	2014–15	2015–16	2016–17	2017–18
Accommodation	90	152	107	111	139
Clubs	7	1	4	6	5
Education	118	99	126	104	123
Employment	1540	1670	1139	1074	1147
Goods and Services	591	579	501	408	575
Local Government	3	3	2	0	0
No Area Required	328	345	219	191 ⁴⁴	248 ⁴⁵
Sport	16	22	5	12	9

4.3 THE VEOHRC'S DISPUTE RESOLUTION PROCESSES

The *EOA2010* says very little about the processes the VEOHRC should follow in an attempt to resolve the dispute, other than to require the process to be confidential. If the complaint proceeds to VCAT, anything said during the dispute resolution process at the VEOHRC is not admissible in those proceedings.⁴⁶ The *EOA2010* uses the term 'dispute resolution' yet it does not define it.⁴⁷ The Act does, however, contain five principles that the VEOHRC is required to observe when carrying out this function:

- a) dispute resolution should be provided as early as possible; and
- b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and
- c) the dispute resolution process is fair to all parties; and
- d) dispute resolution is voluntary; and
- e) dispute resolution should be consistent with the objectives of this Act.⁴⁸

During the 2017–18 financial year, the VEOHRC finalised 76 per cent of complaints within six months of receiving them. This includes complaints that were withdrawn and when its dispute resolution services were not offered.⁴⁹

The conciliators who were interviewed reported that the earlier they could bring the parties together, the more likely they were to reach a resolution, a sentiment many of the solicitors shared.

“My experience of dealing with complainants is that their claim becomes their entire life far too often. And the sooner that you can bring that to a conclusion the better off they are.” (respondent solicitor)

Complainant solicitors were concerned about the time it can often take to organise a conciliation session at the VEOHRC, though they noted that it was not as long as it took at the AHRC, which was a factor in deciding to use the Victorian system. In the opinion of one complainant solicitor, it seemed as though the respondent was able to keep delaying by not responding to the VEOHRC and that the Commission was not 'tough' on them. In this context, it is worth noting that the interviews with solicitors took place between mid-2017 and mid-2018 when the VEOHRC was in the midst of processing a large backlog of files and restructuring its Dispute Resolution Team.

There were solicitors who thought that the complaint handling processes in the *EOA2010* were not as good as the *EOA1995*. Under the *EOA1995* the complaint had to be in writing and set out the details of the alleged contravention⁵⁰ and the VEOHRC was required to assist the complainant in formulating their complaint.⁵¹ The *EOA2010* does not contain the same requirements. Complaints are lodged using the Commission's complaint form online, by post, or in person. That form asks the complainant to describe the events, the impact on them and the outcome they are seeking.

⁴⁴ Includes 8 complaints of vilification and an unknown number of authorising/assisting and victimisation complaints under the *Racial and Religious Tolerance Act 2001* (Vic).

⁴⁵ Includes 18 complaints of vilification and an unknown number of authorising/assisting and victimisation complaints under the *Racial and Religious Tolerance Act 2001* (Vic).

⁴⁶ *EOA2010* s 117.

⁴⁷ This is not uncommon. Only the ACT statute defines conciliation: *Human Rights Commission Act 2005* (ACT) s 55(1).

⁴⁸ *EOA2010* s 112.

⁴⁹ *VEOHRC 2017/18 Annual Report* 11.

⁵⁰ *EOA1995* s 105.

⁵¹ *EOA1995* s 106.

The VEOHRC is not obliged to assist them with completing this form. A complainant solicitor said that removing this obligation was a loss to the Act. They said that some complainants had ‘excellent stories to tell but they don’t know how to filter parts of their story to connect it to the Act, so they’re starting at a disadvantage if they haven’t had anyone advising them on it.’ Similarly, a respondent solicitor said that the documents they receive are often a ‘stream of consciousness or a lengthy version of events with no explanation as to how it’s said that the Act has been breached’ which was understandable, given the forum, but at times it made it difficult to provide a response.

Under the *EOA2010*, the VEOHRC is not required to investigate the complaint before the parties utilise its dispute resolution processes. This is different from the *EOA1995* because the VEOHRC was required to notify the respondent about the complaint as soon as practicable after receiving it,⁵² and the VEOHRC was then required to investigate the complaint and to decide whether or not to refer it to conciliation within 60 days.⁵³ VEOHRC Dispute Resolution Manager, Michelle Mead, has described it as a ‘very lengthy paper-based process.’⁵⁴ Neither obligation is in the *EOA2010*. Conciliators said that they will sometimes seek a response to clarify issues but generally they will give the respondent a copy of the complaint and ask whether they are prepared to engage in dispute resolution. Four of the complainant solicitors said that this means that there can be a gap in the information that the parties exchange prior to conciliation.

“You turn up to a conciliation here at the Commission or at VCAT and the respondents tell you nothing before you turn up, right, so you’ve given everything and you turn up and you find out some novel thing at the conciliation...surely there’s a better way for this to happen?” (complainant solicitor)

The solicitors found that having the documents in advance led to a better quality of conciliation because both the complaint and the response had been articulated by the time of the conciliation. A complainant solicitor said the old process gave them a ‘baseline for starting [the] conciliation’ whereas now the complainant is ‘completely unarmed’ because the respondent has more knowledge than they do. By contrast, one respondent solicitor thought that not having to lodge a formal response made the Victorian system ‘much less clunky’ than the federal system.

4.3.1 CONCILIATION

The VEOHRC resolves complaints using conciliation, which it described as a process ‘where the people involved in a dispute talk through the issues with the help of the Commission, and with the aim of reaching an agreement on how the dispute will be resolved.’⁵⁵ As it is voluntary, either party can withdraw at any time and this does not prevent them from lodging an application at VCAT.⁵⁶ During the 2017–18 financial year, 64% of complaints were resolved when conciliation was attempted.⁵⁷

Overall, the interviewees were very positive about the dispute resolution services that the VEOHRC provides, particularly the flexibility. Conciliation can take place in person, by phone, or by shuttle,⁵⁸ depending on the nature of the complaint and the parties’ wishes. There is no standard way of conducting a conciliation and the conciliators will respond to the parties’ needs. For example, if the complainant does not want to be in the same room as the respondent, the conciliator will separate them or if they think that it will be conducive for the parties to meet, rather than negotiating ‘by paper’, then they will arrange for a conciliation to take place in person. A conciliator said that they encourage the parties to have a conversation about what happened, rather than just presenting their position on the events.

The solicitors did not have a preference for having a conciliation conducted by phone or in person; they said that this depended on the complaint itself and their client. A complainant solicitor has found that they have a higher chance of resolving the matter successfully if the conciliation takes place in person, but their clients prefer if it takes place over the phone so that they don’t have to face the respondent.

The solicitors thought it was very beneficial that the VEOHRC conciliators were able to devote time to the conciliation session and were willing to extend the time available if they thought that the parties could reach a resolution. This approach was contrasted to the Fair Work Commission which often conducts conciliations quickly and focuses on the ‘transaction’ of settling the claim.

The solicitors saw one of the main benefits of conciliation to be that it gives the parties an opportunity to talk about the issues and behaviours that led to the complaint. They thought that the process gives the complainant an opportunity to

⁵² *EOA1995* s 107.

⁵³ *EOA1995* s 108.

⁵⁴ Michelle Mead, *The Evolution of Enquiries and Complaints at the Victorian Equal Opportunity and Human Rights Commission* <<https://humanrightscommission.vic.gov.au/human-rights/item/890-the-evolution-of-enquiries-and-complaints-at-the-victorian-equal-opportunity-and-human-rights-commission-%E2%80%93-by-michelle-mead-dispute-resolution-manager>>.

⁵⁵ VEOHRC, *Complaint Process* <<https://humanrightscommission.vic.gov.au/discrimination/making-a-complaint/complaints>>.

⁵⁶ *EOA2010* s 118.

⁵⁷ *VEOHRC 2017/18 Annual Report* 11.

⁵⁸ This is a process in which the parties are separated and the conciliator ‘shuttles’ between the two, conveying their views to one another.

speak and be heard, and while listening, the respondent often became aware of something they didn't know or they were educated about their obligations under the Act. In this way, the process itself can become part of the solution and a way of addressing the harm.

"Our clients...feel that when they go through the conciliation process at VEOHRC it's a very therapeutic process, it's a very sort of holistic process, it takes quite a long time and it's very comprehensive and the clients actually feel that they've had a really good opportunity to air all the issues so that's all very positive." (complainant solicitor)

"Where we assess that there may be substance to a complaint, then of course there's very much merit in trying to resolve it in early stage." (respondent solicitor)

"I think for complaints that are significant but potentially minor in their damages, like someone not letting someone into a sports club or night club, I think [conciliation]...represents a really lovely opportunity to serve both the restorative and educative function." (VEOHRC staff)

Under the *EOA1995* conciliation was compulsory, so attendance could be compelled⁵⁹ but attendance is voluntary under the *EOA2010*. The voluntary nature of the new dispute resolution process has resulted in some challenges. Complainant solicitors had encountered respondents who did not provide a response to the complaint or did not attend the conciliation session.

Respondent lawyers also said that their clients do not always participate. One respondent solicitor described an occasion upon which they had recommended that their client participate in conciliation but the client didn't see the benefit and chose not to, the thinking being that if the complainant pursued the matter to VCAT, they could settle it then. Lawyers for both parties said that respondents use the dispute resolution process strategically and use the conciliation process to test how serious the complainant is about pursuing their claim.

4.3.2 WHY SETTLE?

Most complaints are settled at some point before hearing or they are withdrawn. The common reasons the lawyers and VEOHRC staff gave for why complainants settle were:

- the cost of taking the claim further (even if a complainant has funding from Victoria Legal Aid or support from a union at the Commission stage, they might not be able to represent them if they proceed further);
- the risk of losing, which is made more complex by the limited case law concerning many aspects of the *EOA2010*;
- the time required to pursue the claim;
- the psychological and emotional costs of pursuing litigation;
- it is a private process so they can resolve the claim without the details becoming public at a tribunal hearing;
- they retain control of the process and the outcome, rather than having it imposed on them by a third party; and
- satisfaction with the offer made by the respondent.

"For complainants I think it's a question of most of them will say to me I just want this over and done with, so the emotional cost is a factor not to be underestimated." (complainant solicitor)

"Litigation, you wouldn't wish it on your enemy, especially in a discrimination claim...The other thing about litigation is you lose control. So with settlement and negotiation, the parties are in control. Whereas, as soon as the litigious process starts, well, yes, the parties can take that control by settling, but then the control gets passed to the court." (barrister)

⁵⁹ *EOA1995* s 114(2).

“Even if you’ve kind of managed their expectations and it’s not a bad outcome from our perspective but it’s pretty draining and stressful thing to go through even if it’s just a conciliation at the Commission.”
(complainant solicitor)

“Something needs to happen around the financial, you know the economics of bringing a discrimination claim. At the moment it makes zero economic sense. In fact it’s...financially detrimental generally to pursue a claim to hearing.” (complainant solicitor)

Participants said that a respondent will decide to settle a claim for commercial reasons including the time and resources that will be required to defend the claim and the impact of this on their business. Another factor is that if they settle, they can seek a confidentiality clause. Participants noted that settlement agreements usually contain such a clause which requires the parties to keep the nature of the claim and the terms of settlement confidential.

The VEOHRC does not publish any data about the terms negotiated when a complaint is settled.⁶⁰ The only information it releases about discrimination complaints are the case studies in its annual report and it publishes ‘conciliation case studies’ on its website which is a sample of the type of complaints it receives.⁶¹ By contrast, the AHRC maintains a conciliation register which some solicitors found quite useful⁶² and thought that the VEOHRC should do the same. Two complainant solicitors said that such a register would be helpful to manage their clients’ expectations (as well as the respondent’s) and show that systemic changes are being negotiated. The two complainant solicitors thought it would also indicate whether they themselves are perpetuating low levels of compensation because they could compare the levels of compensation that they negotiated with what others have negotiated. In saying that, as the solicitors acknowledged, each complaint is fact specific and not necessarily comparable, so such a database could only be used as a guide.

“The majority of the clients I’ve acted for are much more interested...in getting on with running their business than they are with spending time on dealing with a complaint.” (respondent solicitor)

4.3.3 TERMS OF SETTLEMENT

There is no limit on the terms that the parties can agree to in order to settle a claim, and lawyers said that they don’t feel constrained by what is in the *EOA2010*; they negotiate beyond it. One of the solicitors said that the experienced conciliators were skilled at getting the parties to think creatively about the best way of resolving a claim and that this often led to systemic changes.

Participants were asked about the type of remedies they negotiated at settlement, other than financial compensation. They reported that complainants often seek a change in policies or practices so that others don’t have to experience what they did and training so that the respondent understands its obligations. In the employment context, complainants often want their job back and, depending on whether or not the relationship has broken down, they may be able to return to work.

Outside of employment, complainants seek access to goods or services that they were denied. In education, complainants will want to rectify the defects in the way that the education was delivered, but if that isn’t possible, they will seek compensation. Though often sought, apologies are not commonly included in the terms of settlement. A respondent solicitor said: ‘apologies are often asked for, rarely given. My view, when acting for a complainant, is that if you have to ask for an apology it’s not worth having.’

“What conciliators do during negotiations is put options on the table...all of us have been trained...to look at systemic issues. So it’s about putting on the table ideas that would address complaints and an outcome that would give it a systemic outcome as well.” (VEOHRC staff)

“And the good thing about that is in negotiation you can be fairly creative with the sorts of practical remedies you seek and get...you can secure practical remedies which a tribunal would probably never order.” (complainant solicitor)

⁶⁰ Compare the Equality Commission for Northern Ireland case study discussed in 5.3.

⁶¹ Victorian Equal Opportunity and Human Rights Commission, *Conciliation Case Studies* <<https://www.humanrightscommission.vic.gov.au/discrimination/making-a-complaint/case-studies>>.

⁶² As do complainants. In *Galea v Harnett – Blairgowrie Caravan Park* [2012] VCAT 1049, the complainant referred to the compensation awards listed in an AHRC publication: at [84].

4.4 VCAT

If the parties cannot resolve the complaint at the VEOHRC, the complainant can lodge a claim at VCAT⁶³ where it will be heard in its Human Rights List.⁶⁴ Table 8 presents the number of claims lodged at VCAT under the *EOA2010* over the last five financial years.⁶⁵

TABLE 8: EOA2010 CLAIMS LODGED AT VCAT

2013–14	2014–15	2015–16	2016–17	2017–18
232	223	162	201	310

Three complainant solicitors and two barristers expressed concern about how the timeframes at the VEOHRC interact with the timeframes at VCAT. The *EOA2010* does not include any time requirements for processing complaints⁶⁶ but VCAT has the power to summarily dismiss an application if the alleged contravention occurred more than 12 months before the complainant made their application to VCAT.⁶⁷ The lawyers said it was unclear how this provision operates if the complainant has attempted to resolve the claim at the VEOHRC first, particularly as that may mean that the alleged discrimination had occurred more than 12 months earlier. The federal system operates differently. Because the AHRC has to receive complaints first, the only relevant period is the date upon which the President of the AHRC terminated the complaint. The complainant then has 60 days to lodge their application in the federal courts.⁶⁸

As a barrister explained, ‘filing with the Victorian commission doesn’t stop your clock on your VCAT application.’ The barrister said this was ‘an extra added technicality for complainants [and it’s] also an extra expense for respondents’. A complainant solicitor said that respondents are using this provision to attempt to strike out the claim, and even if they are not successful, it delays hearing the claim and costs the complainant in legal fees.

4.4.1 DIRECT ACCESS TO THE TRIBUNAL

As noted above, since August 2011 complainants have had the option of lodging their claim at VCAT directly.⁶⁹ Victoria is the only jurisdiction to offer this option to complainants; conciliation is compulsory everywhere else. One of the respondent solicitors reflected that this change in process means that they now approach conciliation differently. Because it is optional, it is their view that a complainant must genuinely want to resolve the matter if they are choosing conciliation rather than litigation.

Although all except one of the complainant solicitors said that they usually approach the VEOHRC first (because it will give them two opportunities to resolve the complaint), they liked the fact that they had the option to lodge directly at VCAT, and said that there were instances in which that course of action would be appropriate. The main reason solicitors will lodge at VCAT first is that it is regarded as a quicker process, particularly over the last few years due to the backlog of processing complaints at the VEOHRC. A complainant solicitor said that if they have a client who doesn’t have the energy to pursue the claim over a long period of time but they are ‘fired up’, then it will be better to lodge at VCAT first and try to resolve it quickly. Another complainant solicitor gave an example of having written a letter of demand to an employer and trying to engage with them but the employer did not respond. The complainant felt that they had already wasted enough time trying to bring the employer ‘to the table’ and wanted the process to be finalised, so the solicitor advised them to lodge directly at VCAT.

The other reason complainant solicitors gave for lodging at VCAT first is to put pressure on the respondent. They said that some respondents will not negotiate until the consequences of the claim become clear, and that doesn’t happen until the claim reaches VCAT. They said that because VCAT is a tribunal and attendance is compulsory, this pressure is often enough to begin negotiating. They contrasted this to the VEOHRC’s dispute resolution processes, which they described as ‘gentle’. They said that using the VEOHRC was preferable if an employment relationship was still on foot as it could be maintained. In contrast, one complainant solicitor had a preference for lodging at VCAT directly if the respondent was a school and the child was still enrolled at the school because the child would get a quicker resolution.

Some lawyers expressed concern that unrepresented complainants were lodging at VCAT without fully understanding the law and how it operates, and were quickly finding themselves at risk of a costs order against them because their claim was frivolous.

⁶³ *EOA2010* s 122.

⁶⁴ The List was created in 2013. Previously matters were heard in the Anti-Discrimination List.

⁶⁵ Data was sourced from the tribunal’s Annual Reports which are available at: <<https://www.vcat.vic.gov.au/about-us/annual-reports-and-strategic-plan>>.

⁶⁶ Other than giving the VEOHRC the discretion to decline a complaint where the alleged contravention occurred more than 12 months before the complainant lodged their complaint: *EOA2010* s 116(a).

⁶⁷ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), Schedule 1, Item 18.

⁶⁸ *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

⁶⁹ *EOA2010* s 122.

VCAT does not record how many claims are lodged directly at the tribunal, which makes it difficult to assess the impact of this significant change to the dispute resolution process. Over the years the VEOHRC has tracked this informally and estimated how many discrimination claims were lodged directly at VCAT:

- in 2011–12, 91 applications were lodged directly at VCAT (out of 178 applications in total);⁷⁰
- in 2012–13, 60 applications were lodged directly at VCAT (out of 149 applications in total);⁷¹
- in 2013–14, 69 applications were lodged directly at VCAT⁷² (total applications unknown);
- in 2014–15, 76 applications were lodged directly at VCAT⁷³ (total applications unknown).

It is difficult to track the claims entirely accurately because unless they are listed for a directions hearing, there is no public record that they were lodged. Not all matters are listed for a directions hearing; some are referred to alternative dispute resolution first, and so no one outside VCAT will be aware that these claims were lodged.

4.4.2 DISPUTE RESOLUTION AT VCAT

With the introduction of the *EOA2010* and direct access to the tribunal, VCAT introduced a new case management model whereby claims would not be automatically listed for a directions hearing, rather each would be ‘carefully reviewed to determine the most suitable first step.’⁷⁴ Consequently, some claims are initially referred to alternative dispute resolution. The tribunal reports that it has found that access to alternative dispute resolution earlier in the process has meant that the parties’ relationship is more likely to be preserved and costs will be minimised.⁷⁵

The tribunal offers two forms of alternative dispute resolution to parties — compulsory conferences and mediation. A compulsory conference is conducted by a Tribunal Member or Registrar, while a mediation is conducted by a trained mediator.⁷⁶ A party can be compelled to attend.⁷⁷ Anything said or done during either process is not admissible as evidence if the claim proceeds to hearing.⁷⁸ Table 9 presents the number of claims under the *EOA2010* which were referred to a compulsory conference or a mediation over the last five financial years, and the rate of settlement for each process.⁷⁹

TABLE 9: VCAT DISPUTE RESOLUTION PROCESSES: *EOA2010* CLAIMS

	2013–14	2014–15	2015–16	2016–17	2017–18
Claims referred to Compulsory Conference	18	61	68	54	83
Settlement rate for Compulsory Conferences	45%	54%	67%	57%	39%
Claims referred to Mediation	40	61	34	48	72
Settlement rate for Mediations	33%	50%	55%	62%	48%

⁷⁰ VEOHRC 2011/12 Annual Report 45.

⁷¹ VEOHRC 2012/13 Annual Report 43.

⁷² VEOHRC 2013/14 Annual Report 24.

⁷³ VEOHRC 2014/15 Annual Report 22.

⁷⁴ VCAT 2011/12 Annual Report 21.

⁷⁵ VCAT 2011/12 Annual Report 21.

⁷⁶ Victorian Civil and Administrative Tribunal Act 1998 (Vic) ss 83, 88; Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 84 (‘VCAT 2017/18 Annual Report’)

⁷⁷ Victorian Civil and Administrative Tribunal Act 1998 (Vic), ss 83, 84, 89.

⁷⁸ Victorian Civil and Administrative Tribunal Act 1998 (Vic) ss 85, 92.

⁷⁹ Data provided by VCAT. Copy of email on file with the author.

4.4.3 HEARING

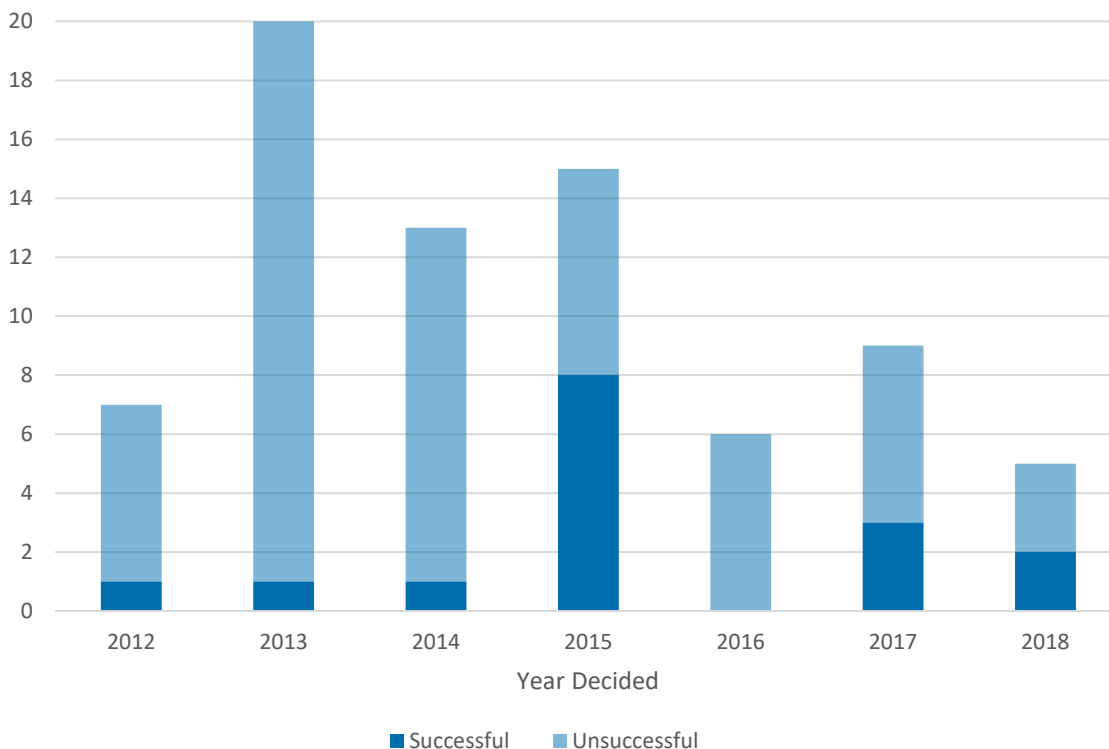
Table 10 presents the type of applications lodged at VCAT between September 2011 and December 2018. As this shows, most of the tribunal's work related to hearing cases, followed by applications by respondents to strike out all or part of a claim.⁸⁰

TABLE 10: EOA2010 APPLICATIONS AT VCAT: SEPT 2011 – DEC 2018

Type of Decision	Quantity	Percentage
Costs Order	5	3%
Exemption Application	43	23%
Other Procedural Application	11	5%
Strike Out Application	52	28%
Substantive Decision	75	41%
Total	186	100

Of the substantive decisions VCAT heard in this period, 16 were successful, and 59 were dismissed pursuant to s 125(c) of the EOA2010. This is a success rate of 21%. Figure 1 shows the substantive decisions by year between 2012 (when the first case was decided) and December 2018, and how many were successful.

FIGURE 1: EOA2010 CASES DECIDED BY YEAR



⁸⁰ Pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Claims can be lodged on the basis of more than one attribute. Of the 75 cases considered in this study, 17 were made on the basis of two attributes, 7 were made on the basis of three attributes and 1 was made on the basis of more than three attributes. Table 11 shows the attributes considered in the substantive cases VCAT has heard under the *EOA2010*. Each attribute was counted individually.

TABLE 11: *EOA2010* CASES BY ATTRIBUTE

Age	4
Disability	29
Employment Activity	5
Family Responsibilities	1
Gender Identity	1
Industrial Activity	1
Lawful Sexual Activity	1
Physical Features	22
Political Belief or Activity	4
Pregnancy	2
Race	12
Religious Belief or Activity	4
Sex	10
Sexual Harassment	5
Status as a Parent or Carer	4
Victimisation	5

There was an unusual number of claims lodged on the basis of physical features during this period. This is because in 2013, 16 members of the Victorian Police force lodged separate individual claims against Ken Lay, the then Police Commissioner, on the basis of physical features.⁸¹ Putting those claims to one side, Table 11 shows that disability, race and sex are the most common attributes upon which claims are lodged at VCAT, which reflects what occurs at the VEOHRC.

Table 12 shows which area the substantive cases VCAT heard under the *EOA2010* related to. Again, this reflects what occurs at the VEOHRC in that most cases related to employment. As the claims were lodged on the basis of one area only, it is possible to calculate the success rate for each. This shows that education claims are the most likely to be successful, followed by claims in the area of goods and services.

TABLE 12: *EOA2010* CASES BY AREA

	Successful	Unsuccessful	Success Rate
Accommodation	1	6	17%
Education	2	6	33%
Employment	9	33	27%
Goods and services	4	13	31%
Qualifying bodies	0	1	0%

⁸¹ *Downes v Lay* [2013] VCAT 1978; *Kuyken v Lay* [2013] VCAT 1972; *Hunter v Lay* [2013] VCAT 1973; *Ranik v Lay* [2013] VCAT 1974; *Garrisson v Lay* [2013] VCAT 1975; *Chrisant v Lay* [2013] VCAT 1976; *Twining v Lay* [2013] VCAT 1977; *Kelly v Lay* [2013] VCAT 1979; *Lloyd v Lay* [2013] VCAT 1980; *Smith v Lay* [2013] VCAT 1981; *Beale v Lay* [2013] VCAT 1982; *Haines v Lay* [2013] VCAT 1983; *Greenland v Lay* [2013] VCAT 1984; *Edwards v Lay* [2013] VCAT 1985; *Shields v Lay* [2013] VCAT 1986; *Wise v Lay* [2013] VCAT 1987.

4.4.4 LEGAL REPRESENTATION AND COSTS

As discussed above, one of the reasons the parties decide to settle is the cost of pursuing litigation. This includes the cost of legal representation, the cost of seeking expert evidence (e.g. from a medical practitioner), the cost of the time that they will be required to devote to preparing or defending their case, and the amount of time that they will have to be in court.⁸²

The type of representation each party had in the 75 claims that went to a full hearing in the period considered in this study is presented in Table 13.

TABLE 13: LEGAL REPRESENTATION AT VCAT IN EOA2010 CASES

Party	Outcome of case	No representation	Barrister	Solicitor	Other ⁸³
Complainant	Discrimination proven	5	9	2	0
	Discrimination not proven	44	11	0	4
	Total	49	20	2	4
Respondent	Discrimination proven	1	11	4	0
	Discrimination not proven	8	47	4	0
	Total	9	58	8	0

This overwhelmingly shows that respondents are much more likely to have legal representation than not and they are very likely to have a barrister. Complainants are less likely to have legal representation and if they do, it is usually a barrister. Both parties are far more likely to win their claim if they are represented by a lawyer. Complainants with lawyers successfully established discrimination in 69 per cent of cases and respondents with lawyers successfully defended a discrimination claim in 86 per cent of cases.⁸⁴ While not conclusive, this certainly suggests that having legal representation greatly increases the likelihood of success for both parties.

However, engaging legal representation also has risks. Unless they are acting *pro bono* or on a ‘no win, no fee’ basis, the lawyers have to be paid, whether or not their client wins. Complainants who pursue their claim to hearing not only face the risk of losing and having to pay their legal costs, they also face the possibility that they will be successful but their compensation award might not be enough to cover their legal fees. For example, in *Collins v Smith*, the complainant made an offer of \$195,000 during the course of the hearing, which included costs estimated to be \$129,001.⁸⁵ Had the respondent accepted the offer, the complainant would have been left with only \$66,000.⁸⁵

“You could have an offer of, you know, \$50,000 at the Commission. They might want 60. If you go to VCAT your legal costs are going to be so high that even if an offer of 60 is made you will be left with less after payment of legal costs.” (complainant solicitor)

“You’re seeing settlements get held up on costs, which is not the intention, but also how are these lawyers going to run these cases if they don’t do a ‘no win, no fee’, or if they can’t settle for their costs...I know a lot of them do reduce their fees or keep fees as low as possible but at the end of the day, they’re not charities.” (barrister)

⁸² The average hearing length of the cases considered in this study was 5 days.

⁸³ In three cases, the complainant was represented by a disability advocate. In the fourth case, the complainant was self-represented and was assisted by a person who was not a professional advocate and the respondent did not object to them representing the complainant: *Phillips v Royal Botanic Gardens Victoria* [2018] VCAT 1397.

⁸⁴ Note that this doesn’t include the 52 strike out applications heard in this period, in which many respondents were successful.

⁸⁵ She was ultimately awarded \$332,280 plus costs: [2015] VCAT 1992.

VCAT is designed to be a no-costs jurisdiction and each party bears their own costs. The fact that there is no risk of costs is the primary reason complainant solicitors said that they prefer to use the state system rather than the federal one (unless they have a strong case and want to pursue costs).⁸⁶ In *Slattery v Manningham CC*, Deputy President Nihill noted that it is the exception that costs orders are made against parties, particularly in the Human Rights List.⁸⁷ The tribunal can award costs in some circumstances, such as if one party conducted the claim in such a way that it unnecessarily disadvantaged the other party or if one party was responsible for unreasonably prolonging the claim.⁸⁸

VCAT only awarded costs in one of the successful cases considered in this study.⁸⁹ In awarding costs in *Collins v Smith*, Judge Jenkins took into account the respondent's delay prior to hearing (which caused the complainant stress and increased the cost of presenting her case), the respondent prolonged the length of the hearing, and the respondent's failure to make a bona fide settlement offer or to accept any of the genuine settlement offers that the complainant made.⁹⁰

4.4.5 REMEDIES

If it finds that discrimination has occurred, VCAT may make an order that:

- the respondent refrain from committing any further contravention of the *EOA2010*;
- the respondent compensate the complainant for loss, damage or injury suffered as a result of the contravention; and/or
- the respondent do anything specified to redress any loss, damage or injury suffered by the complainant.

Or VCAT may decline to take any further action.⁹¹

The remedies are compensatory in nature and so it is not surprising to find that compensation was the most common order VCAT made in the cases considered in this study, as shown in Table 14. However, compensatory orders are not the only orders that complainants seek. Of the cases considered in this study, 24 complainants sought an apology (including the 16 complainants from Victoria Police, all of whom were unsuccessful), 3 sought training and 3 sought a change in the respondent's policies. Of those remedies, training is the only remedy other than compensation that VCAT ordered during this time period and in both instances, the respondent argued that training could only be ordered if the purpose of it was to minimise the potential for any contravention of the *EOA2010* against the complainant in the future.

The first case in which training was ordered was an unusual situation because as well as making a finding of direct discrimination, Deputy President Nihill found that the respondent local council had breached the complainant's human rights, including his right to equality. There was evidence that some Council officers had not received training on the Victorian Charter of Human Rights and Responsibilities. The complainant sought equal opportunity training but Deputy President Nihill ordered the respondent to provide its Councilors, the Chief Executive Officer, and its Directors with training on the Charter. She said that training would 'make a positive contribution towards redressing loss experienced by Mr Slattery, and incidentally, may support Council in its complex role.'⁹²

In the second case, *Kibet v Empire Club*, Senior Member Steele ordered staff at the respondent night club to complete training on the *EOA2010* because the evidence showed that there had been 'insufficient specific training about discrimination and equal opportunity for the club's officers and employees'. Further, Senior Member Steele said that simply ordering the respondent's staff not to contravene the *EOA2010* in the future in respect of the complainant would not be effective because it was likely that its staff would not know what that meant, and so they needed training about the law.⁹³

Of the 24 cases in which an apology was sought, 3 of them were successful but an apology was not ordered in any of them. In *Slattery v Manningham CC*, Deputy President Nihill said that the tribunal's finding that the Council's order prohibiting the complainant from entering any building it owned, occupied or managed breached the complainant's rights was sufficient as a public statement that its conduct was unlawful, and so an apology was not necessary.⁹⁴

The complainant was successful in 2 of the 3 cases in which a change in policy was sought but the tribunal declined to make an order for a change in policy in both cases. In *Harrison v Department of Education and Training* the complainant sought an order that the respondent 'observe and reconsider policies and practices affecting people with disabilities'.

⁸⁶ Section 43 of the *Federal Court of Australia Act 1976* (Cth) and s 79 of the *Federal Circuit Court of Australia Act 1999* (Cth) gives the court the discretion to award costs in discrimination proceedings except for those arising under the *FWA*.

⁸⁷ [2014] VCAT 1442 [85].

⁸⁸ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109.

⁸⁹ *Collins v Smith* [2015] VCAT 1029. In *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936, the complainant was only awarded the costs of having an expert attend the tribunal for one day.

⁹⁰ [2015] VCAT 1992.

⁹¹ *EOA2010* s 125.

⁹² *Slattery v Manningham CC* [2014] VCAT 1442 [44]–[50].

⁹³ [2018] VCAT 1868 [138]–[139].

⁹⁴ [2014] VCAT 1442 [71].

Senior Member Burdon-Smith said that this was not an appropriate order to make because the respondent was already subject to the *EOA2010*.⁹⁵

Table 14 lists the remedies that VCAT ordered in the 16 claims that were successful during the timeframe considered in this study. It shows that discrimination is predominantly remedied with an order for compensation. Of the cases in which compensation was not ordered, in one case compensation was awarded on appeal,⁹⁶ in the second case the parties agreed to a remedy during a subsequent compulsory conference,⁹⁷ and in the third case, although the tribunal found indirect discrimination proven, it declined to make any order for compensation.⁹⁸

TABLE 14: REMEDIES AWARDED BY VCAT IN EOA2010 CASES

Apology	0
Change to policies or practices	0
Compensation	13
Other	1 ⁹⁹
Statement of service	0
Training	2

The primary reason for the dominance of compensation is that it is usually the most useful remedy for the complainant. For example, they may need to recover lost wages or entitlements or have ongoing medical costs. As the complaint progresses, the complainant's legal costs will increase and they will need to recover that expenditure. However, compensation is an individualised remedy, and while it may address the harm caused to the individual, it doesn't address instances of discrimination that other people have experienced. The challenge that the dominance of compensation poses for addressing systemic discrimination is considered below at 5.2.

"At the end of the day, you spend most of the time talking about money. I mean, it's the commercial reality of it. That's how we compensate." (barrister)

"Money is the primary remedy." (respondent solicitor)

"VCAT is still, in my view, less inclined to make larger orders for compensation than the federal courts." (respondent solicitor)

The compensation awards considered in this study ranged from \$1,090 to \$332,280, as shown in Figure 2.¹⁰⁰ The lowest compensation award was in *Galea v Harnett – Blairgowrie Caravan Park* in which the complainant was refused a booking at a caravan park due to his parental status. The complainant was awarded \$1,000 to represent the emotional value of the lost holiday and \$90 to cover travel to the caravan park.¹⁰¹ The highest compensation award was in *Collins v Smith* and it included damages (including, unusually, an amount for aggravated damages) of \$200,000. In that case Judge Jenkins found 33 instances of sexual harassment proven, 6 of which included physical assault. The award stands

⁹⁵ [2017] VCAT 1128 [269].

⁹⁶ *Obudho v Patty Malones Bar Pty Ltd* [2017] VSC 28.

⁹⁷ *Arora v Melton Christian College* [2017] VCAT 1507. The parties agreed during the hearing to attend a compulsory conference to reach an agreement on what orders the tribunal should make if it found that the respondent had contravened the *EOA2010*. The school subsequently amended its uniform policy after VCAT found it to be unlawful: 'Melbourne Christian school changes tune on turbans' *Sydney Morning Herald* (9 January 2018) available at <<https://www.smh.com.au/education/melbourne-christian-school-changes-tune-on-turbans-20180109-h0foek.html>>.

⁹⁸ *Ferris v Department of Justice and Regulation* [2017] VCAT 1771. This was not at issue on appeal: *Ferris v State of Victoria* [2018] VSCA 240.

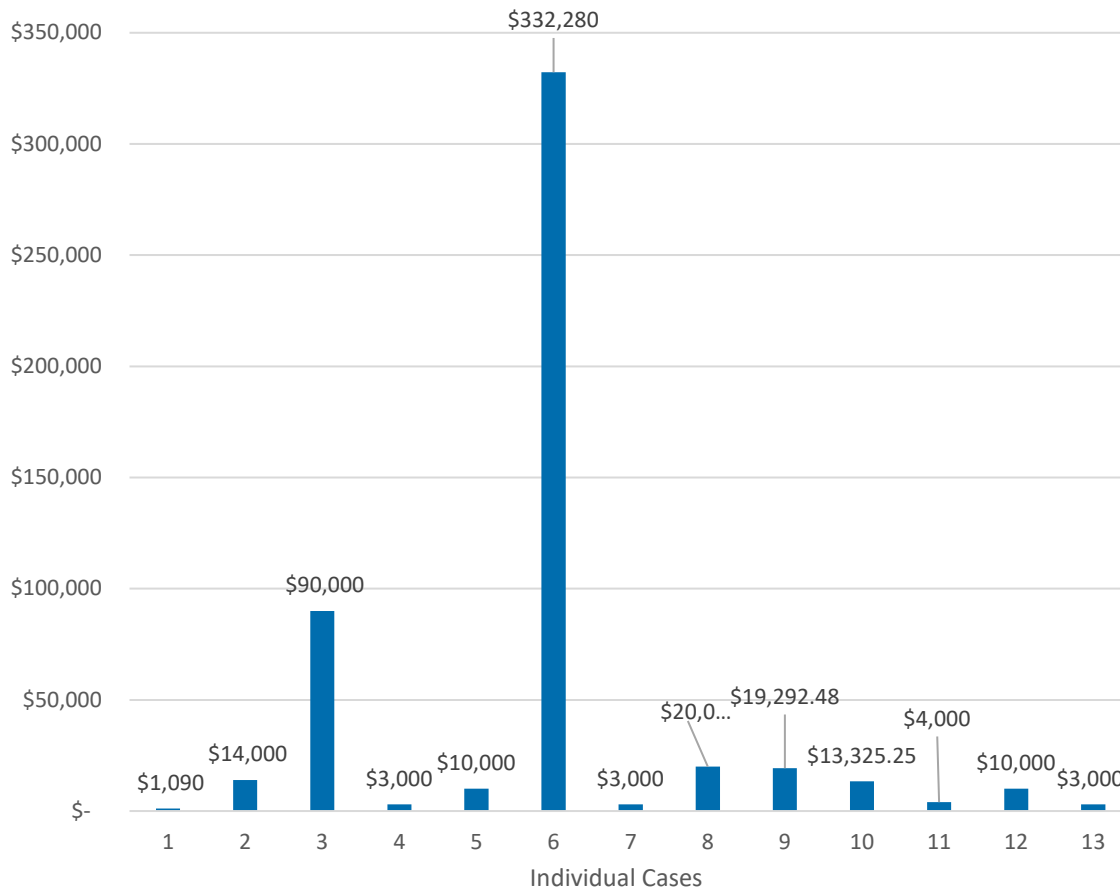
⁹⁹ In *Slattery v Manningham CC* [2014] VCAT 1442, Deputy President Nihill ordered that the respondent's declaration that prohibited the complainant from entering any building that is owned, occupied or managed by the respondent must be revoked.

¹⁰⁰ The cases in the numerical order they appear in Figure 2 are: *Galea v Harnett – Blairgowrie Caravan Park* [2012] VCAT 1049, *Slattery v Manningham CC* [2014] VCAT 1442, *Martin v Padua College* [2014] VCAT 1652, *Jemal v IS Facility Services Pty Ltd* [2015] VCAT 103, *Bevilacqua v Telco Business Solutions (Watergardens) PL No.2* [2015] VCAT 693, *Collins v Smith* [2015] VCAT 1992, *Dirckze v Holmesglen Institute* [2015] VCAT 116, *Dziurbas v Mondelez Australia Pty Ltd* [2015] VCAT 1116, *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936, *Butterworth v Independence Australia Services* [2015] VCAT 2056, *Harrison v Department of Education and Training* [2017] VCAT 1128, *XVC v Joanne Baronessa* [2018] VCAT 1492, *Kibet v Empire Club* [2018] VCAT 1868.

¹⁰¹ [2012] VCAT 1049.

not only as a high watermark in Victoria but throughout the country.¹⁰² Of the decision, barristers Therese McCarthy and Sarala Fitzgerald wrote: 'It is clear... that the tariff for pain and suffering has now increased substantially in sexual harassment matters, bringing them into line with other areas involving personal injury.'¹⁰³

FIGURE 2: COMPENSATION AWARDED BY VCAT IN EOA2010 CLAIMS



As Table 15 shows, employment claims receive higher compensation awards than complaints relating to education or goods and services. This is understandable because in employment claims, compensation is awarded for loss of earnings, including future earnings, superannuation, and medical expenses (including future expenses).

TABLE 15: COMPENSATION AWARDED BY VCAT IN EOA2010 CASES

	Total	Employment	Non-employment
Average	\$40,230	\$60,326	\$8,077
Median	\$10,000	\$11,662	\$3,000
Highest	\$332,280	\$332,280	\$19,292.48
Lowest	\$1,090	\$3,000	\$1,090

Tables 14 and 15 and Figure 2 do not include the compensation the complainant was awarded in *Obudho v Patty Malones Bar Pty Ltd* because it was not awarded by VCAT at first instance. Member Dea dismissed Mr Obudho's claim for compensation. She found that he had not suffered any loss in consequence of the respondent's breach of the

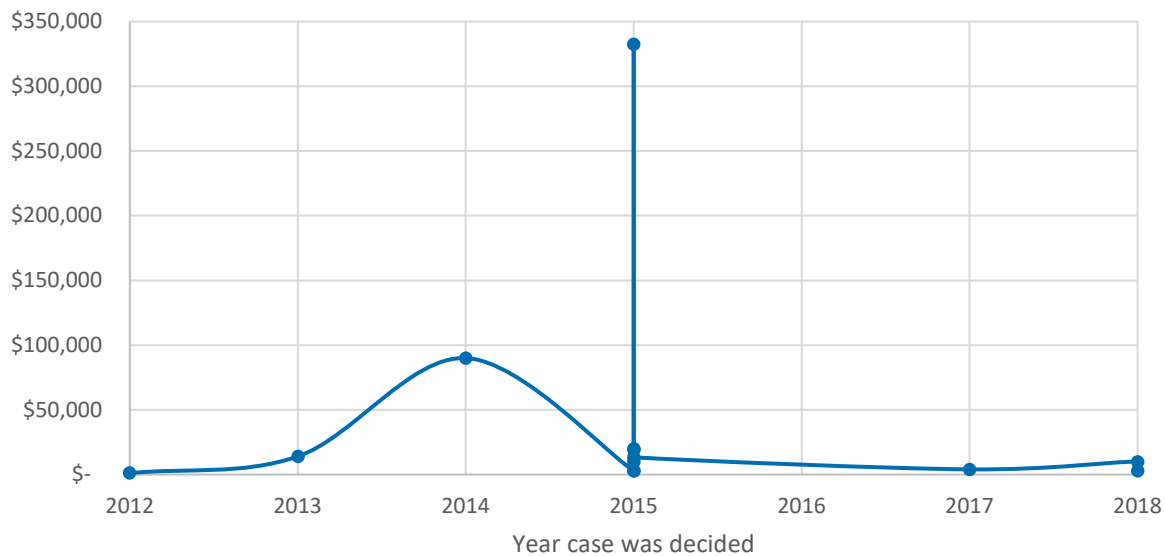
¹⁰² The VEOHRC noted that it was the highest general damages award made under the *EOA2010* and its predecessor in the last 15 years: *VEOHRC 2015/16 Annual Report* 49.

¹⁰³ Therese McCarthy and Sarala Fitzgerald, 'Increasing the Tariff', *Law Institute Journal* (February 2017).

EOA2010 (cancelling the booking for an event he was organising when it discovered that most of the attendees would be African).¹⁰⁴ Member Dea found that the only loss Mr Obudho had suffered was as a prospective attendee and he did not seek compensation for this. However, on appeal, Emerton J disagreed and awarded Mr Obudho \$6,000.¹⁰⁵

The data does not suggest that compensation awards are increasing either gradually or rapidly. Rather they have consistently remained below \$20,000 with an occasional spike. Figure 3 illustrates this.

FIGURE 3: COMPENSATION AWARDED BY VCAT IN EOA2010 CASES BY YEAR



“The big unspoken element is that the amounts that courts or tribunals have been ordering is actually less than what people have been able to secure in confidential settlements”. (complainant solicitor)

“I’ve been involved in matters that have settled for more than reported decisions... I think sometimes... expectations or what’s considered feasible is often drawn from the reported decisions but what happens in confidential settlements can often be quite different.” (barrister)

“Some of the behaviours are completely unacceptable and the courts should censure the companies and the individuals and make the statement through these damages awards that this is not on.” (barrister)

¹⁰⁴ [2015] VCAT 1521 [231].

¹⁰⁵ *Obudho v Patty Malones Bar Pty Ltd* [2017] VSC 28.

5 THE CHALLENGES THAT REMAIN FOR ENFORCING DISCRIMINATION CLAIMS

The findings in this project make it clear that there are significant benefits to having a low-cost, easily accessible model for resolving discrimination complaints. Indeed, none of the people who participated suggested deviating from this model. They recognised the importance of utilising alternative dispute resolution in an area where complainants are often vulnerable or from a marginalised group or where it is necessary for the parties to maintain an ongoing relationship.

Participants also highlighted that the model permitted creative remedies to be fashioned, which courts are unable to do. The healing that often comes with participating in this type of dispute resolution process, and the learning, are features that are hard to replicate in an adversarial court process.

It is clear that parties need to continue to have access to low-cost, accessible dispute resolution services, which are staffed by experienced experts.

However, the research shows that the dispute resolution system still poses significant challenges for a complainant and, as explored below, for the elimination of discrimination overall. A recurring theme was the need for complainants to receive specialised legal advice, preferably early on. Some might receive this from their union, Victoria Legal Aid or a community legal service but not all. Without legal advice, they might not lodge their claim in the most suitable jurisdiction, they might struggle to articulate their complaint as a legal claim or they might find themselves facing a hearing unprepared.

As the enforcement model is presently structured, it would not be appropriate for the VEOHRC to provide legal advice but it seems that the move to early dispute resolution has resulted in the loss of one of its important functions in that it is not required to assist the complainant with formulating their complaint, nor can it require a response prior to a conciliation. While it is not desirable to return to a long, paper-based process, it seems that a balance could be struck so that by the time of the conciliation the respondent clearly understands the nature of the legal claim and the complainant has an idea about how the respondent intends to respond to their complaint. Much of this could be done through pre-conciliation discussions between the conciliator and the parties.

Leaving that to one side, the research also highlights that the dispute resolution process in Victoria (like the rest of the country) is centred on the individual who experienced discrimination. Discrimination will only be addressed if the individual recognises that the treatment that they were subject to was unlawful discrimination and decides to lodge a complaint at the VEOHRC or VCAT. In many instances people will choose not to do anything, preferring to find another job, use another service or go to another school. The data shows that most complaints are settled confidentially or withdrawn. While complainants seek wider, systemic remedies, it is not possible to say with any certainty whether or not they are negotiated because this information is not available.

There are three problems with the current model of addressing discrimination. First, most complaints are settled confidentially so the community is unaware of the type of discrimination that persists or how it is being addressed. Second, whether the complaint is settled or successfully proven at court, it results in an individualised remedy which may address the harm experienced by the complainant on a case-by-case basis but does nothing to address the experience of similarly situated individuals or broader inequality in the community. Third, the system is reactive so it is not designed to proactively promote equality, nor does it give organisations an incentive to take the initiative and change their practices voluntarily. These problems are compounded by the limited role the VEOHRC plays in the process.

The VEOHRC's role in the dispute resolution process is limited because it is required to handle complaints as a neutral facilitator, so it cannot act on behalf of either party. The most 'active' role it can play is to act as an *amicus curiae* or intervene in litigation. This stands in contrast to the Fair Work Ombudsman and to equivalent equality agencies in the United Kingdom, Ireland and the USA which can assist parties with their claim and/or take action in their own name.

The final part of this report considers these three remaining challenges — the lack of publicly available information about the nature and prevalence of discrimination complaints and their resolution; the difficulty of addressing other instances of discrimination through individualised remedies; and the absence of an agency which can enforce the law.

5.1 INFORMATION AVAILABLE ABOUT DISCRIMINATION

Both the dispute resolution process and the settlement outcomes are confidential, which has privatised the overall enforcement process. There are certainly good reasons to maintain the confidential nature of the dispute resolution process because it offers protection to both complainants and respondents, and this report does not recommend changing that. However, the drawback of confidentiality is that the community knows very little about the nature and prevalence of discrimination in society or how discrimination is being addressed.

There is empirical evidence from Victoria and elsewhere that suggests that the outcomes negotiated prior to hearing are different from what courts are ordering in that settlement agreements often contain wider remedies and/or higher amounts of compensation.¹⁰⁶ This information is not publicly available which makes it difficult for the parties and their

¹⁰⁶ Sara Charlesworth et al, *Formal Complaints of Workplace Sexual Harassment Lodged with Australian Human Rights and Equal Opportunity Commissions 1 July 2009 – 31 December 2009* (Centre for Work + Life, University of South Australia), 19
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representatives to ascertain how best to resolve their claim and it means courts are not aware of the creative ways in which discrimination could be addressed. This could be overcome by requiring both the VEOHRC and VCAT to publish de-identified data about the outcomes of the settlements negotiated. Indeed, these recommendations were made by the Gardner Review¹⁰⁷ but were not implemented.

The VEOHRC and VCAT do not release much information about claims publicly, as discussed above at 3 and 4.3.2. The VEOHRC publishes statistics about the inquiries and complaints it receives each year in its annual report and some conciliation case studies on its website. VCAT publishes very little information about discrimination claims. It does not collect any information about the attribute or area upon which a claim was made, nor whether claims were lodged directly at the tribunal or at the VEOHRC first. The only information contained in VCAT's annual report that is specific to the *EOA2010* is the number of applications that were filed.¹⁰⁸

The lack of information about how discrimination complaints are being resolved and the type of behaviour that is still taking place could be improved by requiring VEOHRC and VCAT to publish de-identified data about claims. In addition to recording the attribute and area of the claim, that data should include: demographic data about the complainant (e.g. age, sex, birthplace, occupational classification), and the respondent (e.g. individual or business, business size, industry classification); whether or not the parties were represented and by whom, and the settlement terms (including the amount of compensation and whether it was for economic or non-economic loss).

The benefits of releasing this type of information are that: it would help complainants to decide whether or not to lodge a complaint; it would provide the VEOHRC with information for educating the community about the prevalence of discrimination and sexual harassment and how they are being addressed; respondents and their advisers could use the information to educate their employees about the risks and potential consequences, personal and otherwise, of discrimination and sexual harassment; and it would remind the community that discrimination still exists but something is being done to address it.

Recommendations

- The VEOHRC and VCAT should collect and publish de-identified data and case studies about the nature and prevalence of discrimination and sexual harassment, and about the remedies negotiated when complaints are settled.
- VCAT should collect and publish data about the attribute and areas that are the subject of the claims lodged under the *EOA2010*, including whether the claim originated at the VEOHRC or was lodged directly at VCAT.

5.2 SYSTEMIC CHANGE

The predominant way in which VCAT is remedying discrimination is with an order for compensation. VCAT is constrained by the remedies in s 125 of the *EOA2010* and so it can only redress the loss suffered by the complainant. While this means it can order training in some circumstances, it cannot make wider, systemic orders which would address the experience of other people who are experiencing discrimination in employment or in the provision of goods and services. By contrast, the interview data suggests that parties agree to systemic remedies, such as changes to policies and practices, when complaints are settled.

The challenge posed by the dominance of compensation and the tribunal's inability to order systemic remedies is worth considering further. The primary problem with the use of compensation is that as a remedy, it is concerned with the individual, not broader, systemic change. In their assessment of compensation, courts are guided by torts principles¹⁰⁹ so the purpose of compensation is to put the complainant in the position that they would have been in if the respondent had not discriminated,¹¹⁰ not to punish the respondent.¹¹¹ As a remedy, compensation has the potential to change practices or deter other would-be discriminators if it is awarded at sufficiently high amounts. Although this study captured a landmark compensation award, overall the amounts of compensation awarded to date cannot be said to be significant. Nor does compensation encourage compliance because it is reactive — the respondent is not required to take anticipatory action to prevent another complaint. Once they have paid the compensation, the respondent has fulfilled their obligation.

Australia, 2012); Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778; Dominique Allen, 'Removing Barriers to Substantive Equality: A Case Study of Remedying Disability Discrimination Complaints' (2011) 17(2) *Australian Journal of Human Rights* 159.

¹⁰⁷ Gardner Review, Recommendations 29, 33.

¹⁰⁸ Data about how *EOA2010* claims were processed and their speed and their speed is not separated from the other claims it hears in the Human Rights List.

¹⁰⁹ *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, 238–9.

¹¹⁰ *Haines v Bendall* (1991) 172 CLR 60, 63.

¹¹¹ *Commonwealth v Evans* (2004) 81 ALD 402, [80].

It is acknowledged that it is essential that the individual complainant receives a remedy (and often compensation will be the most appropriate one) but if an underlying problem or situation caused the discriminatory event, a compensation award will not necessarily address it; that requires a systemic remedy which affects similarly situated individuals.

Recommendation

- VCAT should be armed with the tools to address discrimination in the community. Section s 125 of the *EOA2010* should be amended to give the tribunal the power to make a wider range of orders including training, changes to the respondent's policies and procedures, changes to working hours and other conditions, and modifications to premises and facilities so people with a disability can access employment, education, goods and services.

5.3 SHIFTING THE BURDEN OF ENFORCING THE LAW AWAY FROM THE INDIVIDUAL

The changes introduced in the *EOA2010* did not move the law away from the individualised, fault-based, reactive approach to addressing discrimination. Nor was the VEOHRC given additional enforcement powers, despite recommendations made by the Gardner Review.¹¹² The VEOHRC's role in the dispute resolution process is to receive complaints and help the parties to resolve them. In performing this role, the VEOHRC is required to be neutral. It cannot advise or assist complainants or enforce compliance with the *EOA2010*. It does, however, have other functions. The VEOHRC is responsible for educating the community about the *EOA2010*¹¹³ and it can conduct public investigations about any matter relating to the operation of the *EOA2010*.¹¹⁴ The VEOHRC can appear in court as an intervener and *amicus curiae*.¹¹⁵ In that role, it does not have to be neutral and can advocate for the *EOA2010*.

It is worth noting that the Gardner Review proposed giving the VEOHRC stronger enforcement powers¹¹⁶ and that it was originally given additional powers under the *EOA2010*¹¹⁷ but these powers were removed before the Act came into force.¹¹⁸

"I think that the cases that I've seen [the VEOHRC] intervene in are good cases for them to be involved with. I think that our — human rights commissions should be visibly seen to be in litigation in that way."
(barrister)

"In an arena like this where the individual has to do all the heavy lifting...systemic discrimination is not going to be addressed unless you have a body like the Commission or an equivalent of the Fair Work Ombudsman in the anti-discrimination sphere." (complainant solicitor)

"We know all about civil penalties in the Fair Work Act jurisdiction and the Fair Work Ombudsman does prosecutions and whatever else...but if you take breaches of human rights law seriously and discrimination seriously, why not have a regulator model? Why not have civil penalties?" (barrister)

¹¹² Gardner Review, Chapter 6.

¹¹³ *EOA2010* s 156.

¹¹⁴ *EOA2010* s 127. Most recently, see VEOHRC, *Fair-minded cover: Investigation into Discrimination in the Travel Insurance Industry* (2019) <<https://www.humanrightscommission.vic.gov.au/home/our-projects-a-initiatives/item/1816-fair-minded-cover-investigation-into-discrimination-in-the-travel-insurance-industry>>.

¹¹⁵ *EOA2010* ss 159, 160.

¹¹⁶ Gardner Review, Chapter 6.

¹¹⁷ See *EOA2010* ss 139, 144–147 as originally enacted.

¹¹⁸ The VEOHRC's new powers were removed by the incoming government. See *Equal Opportunity Amendment Act 2011* (Vic). The Andrews government has not committed to restoring them.

It is clear that the VEOHRC plays a very important role, particularly as a specialist provider of dispute resolution services, which is the focus of this report,¹¹⁹ but the burden of enforcing the law rests on the individual. In doing so the primary concern of most individuals will be on redressing the harm that they have experienced. They should not be expected to remedy the harm other people have experienced or tackle widespread, societal discrimination. That role should be performed by a statutory enforcement agency.

The importance of having a separate agency that can tackle entrenched discrimination has been acknowledged in other countries. For example, in the USA and United Kingdom the statutory agency has had the power to enforce the law since the country's anti-discrimination laws began.¹²⁰ Although Australia took its inspiration from those countries when enacting anti-discrimination laws, it did not take this feature.

If we accept that it should not be the responsibility of the individual to tackle widespread, systemic discrimination and that this should be the responsibility of a statutory regulator,¹²¹ then the question that arises is what is the best model for achieving this? There are two options: one agency that is responsible for handling complaints and enforcing the law; or two agencies — one agency that handles complaints and one agency that enforces the law. The USA uses the first option and the United Kingdom uses the second. As the following explains, the second option is recommended for Victoria.¹²²

The Equal Employment Opportunity Commission ('EEOC') is the federal agency responsible for investigating complaints about employment discrimination in the USA.¹²³ Before a complainant can file a lawsuit in federal court, they must file a 'charge' with the EEOC which must investigate each charge. The EEOC operates as a neutral fact-finder and if it finds that there is reasonable cause that discrimination has occurred, the EEOC attempts to resolve the charge by conference, conciliation or persuasion. If the parties cannot reach agreement, the complainant can litigate or the EEOC may decide to litigate the charge on the complainant's behalf. However, throughout its history the EEOC has found it difficult to enforce the law due to the amount of resources processing charges (which includes investigating each charge to determine whether it has merit) consumes.¹²⁴ This was one of the reasons the British equal opportunity agencies were not required to receive complaints and provide dispute resolution services when they were established in the 1970s.¹²⁵

To avoid this problem, this report recommends creating a separate enforcement agency, which is the model Britain and Northern Ireland use.

There are two statutory agencies in the United Kingdom — the Equality and Human Rights Commission (in Britain) and the Equality Commission for Northern Ireland. Conciliation is available for employment disputes at the Advisory, Conciliation and Arbitration Service in Britain and the Labour Relations Agency in Northern Ireland. Workplace disputes are heard by the Employment Tribunals and civil courts hear non-employment related complaints. The equal opportunity commissions are not responsible for complaint handling or conciliation; they act as an enforcement agency. The primary way both equal opportunity commissions play a role in enforcement is by providing financial assistance to complainants.

¹¹⁹ It was beyond the scope of this project to evaluate the VEOHRC's educative role but it did consider its other functions. The findings will be published elsewhere.

¹²⁰ For a detailed consideration see Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2011) 36(3) *Monash University Law Review* 103, and references cited therein.

¹²¹ Smith has also called for changes to the regulatory model for addressing anti-discrimination law. 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; Belinda Smith, 'It's About Time — For a New Regulatory Approach to Equality' (2008) 36 *Federal Law Review* 117.

¹²² As described below, this is the model used in the FWA.

¹²³ The Equal Employment Opportunity Commission ('EEOC') enforces Title VII of the *Civil Rights Act of 1964*, 42 USC §2000e (1964), the *Age Discrimination in Employment Act of 1967*, 29 USC §633a (1967) and Titles I and V of the *Americans with Disabilities Act of 1990* 42 USC §§ 12101 (1990).

¹²⁴ See further 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.

¹²⁵ Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, fn12, fn68.

CASE STUDY: THE EQUALITY COMMISSION FOR NORTHERN IRELAND

The Equality Commission for Northern Ireland ('ECNI') commenced operation in October 1999. It was established as part of the Belfast ('Good Friday') Agreement of 1998, which was codified in the *Northern Ireland Act 1998* (UK).¹²⁶ The ECNI does not handle discrimination complaints; it is responsible for education and training, and enforcing the law. It educates and provides guidance to employers and service providers about their statutory obligations. Discrimination Advice Officers provide free and confidential advice to people who believe that they have been discriminated against.

The ECNI can also assist individuals with their claims. The type of assistance it provides ranges from giving advice on a claim through to funding the complainant to take their case to a court or tribunal, including external legal representation. After a potential applicant has contacted the ECNI, they can attempt to resolve the matter themselves (or with advice from their own lawyer or other advocate) or they can apply for legal assistance from the ECNI. Approximately 10% of individuals who contact the ECNI for advice go on to apply for assistance and about one third are granted support.

In deciding whether to provide a complaint with legal advice and financial assistance, the ECNI will consider whether the case raises a question of principle; having regard to the complexity of the case, the relative positions of the applicant and respondent, or whether for any other matter it is unreasonable to expect the complainant to deal with it without assistance, or any other special consideration.¹²⁷ Each complaint is assessed individually and the Commission will also consider whether the case falls into its overall strategic objectives and areas of interest; whether the case raises an issue of legal uncertainty; to what extent the case may raise public awareness about an issue; the extent to which the case may have a significant impact and lead to a change in practice or procedure; the prospects of success; the complainant's cooperation with staff at the ECNI; and the Commission's support of previous, similar cases.¹²⁸ The ECNI supported 52 cases in the 2017–18 financial year.¹²⁹

As part of its policy of providing assistance, the ECNI publicises the decisions and settlements for the purpose of 'educating potential applicants and respondents as to their respective rights and responsibilities'.¹³⁰ The ECNI publishes the parties' names¹³¹ and the facts and settlement information for each case it supports in a comprehensive, searchable database on its website¹³² and it issues a media release upon settling a case.¹³³

The terms of settlement could include a clause requiring the respondent to liaise with the ECNI in regard to compliance. The Commission's Advice and Compliance Division contacts all respondents who have agreed to such a clause, provides advice and information about compliance, and discusses what the respondent can do to avoid a discrimination claim in the future.¹³⁴

The ECNI has the power to enforce Northern Ireland's anti-discrimination laws, which it does primarily by conducting investigations. During the course of an investigation, if the ECNI becomes satisfied that an organisation is committing or has committed unlawful acts, it can serve a 'non-discrimination notice' which directs the organisation not to commit unlawful acts. If the organisation is required to change its practices to comply with this direction, it must inform the ECNI and any concerned persons about these changes within the timeframe specified in the notice.

Prior to issuing the notice the ECNI must warn the organisation about its intentions and reasons for issuing the notice, give it time to respond and take any response into consideration.¹³⁵ The recipient can appeal the issue of the notice.¹³⁶ The ECNI is required to maintain a register of such notices which must be available for inspection.¹³⁷ The ECNI can seek an undertaking from a person who has committed or is committing an unlawful act that they will refrain from further specified acts, institute certain practices, or change practices in a manner specified. While the undertaking is in effect, the ECNI can apply for a judicial determination about whether a person has complied with the undertaking.¹³⁸

¹²⁶ The Equality Commission for Northern Ireland ('ECNI') was established by Part VII.

¹²⁷ ECNI, *Policy for the Provision of Legal Advice and Assistance* (Policy Document, August 2018) 4 <https://www.equalityni.org/ECNI/media/ECNI/Publications/Individuals/DAO/Policy-Provision_of_Legal_Advice_and_Assistance.pdf> ('*Legal Advice and Assistance Policy*').

¹²⁸ ECNI, *Legal Advice and Assistance Policy* 3–5.

¹²⁹ ECNI, *Annual Report and Accounts 2017–18* (Annual Report, September 2018), 1816.

¹³⁰ ECNI, *Legal Advice and Assistance Policy* 12.

¹³¹ Where circumstances require it, the parties' names may be kept confidential or anonymised.

¹³² ECNI, *Case Decisions and Settlements* <<https://www.equalityni.org/cases>>.

¹³³ See eg ECNI, 'Settlement in sex discrimination case by Limavady council worker' (Media Release, 21 August 2018).

¹³⁴ ECNI, *Legal Advice and Assistance Policy* 4.

¹³⁵ *Race Relations (Northern Ireland) Order 1997*, art 55.

¹³⁶ *Race Relations (Northern Ireland) Order 1997*, art 56.

¹³⁷ *Race Relations (Northern Ireland) Order 1997*, art 58.

¹³⁸ See eg *Race Relations (Northern Ireland) Order 1997*, arts 62(2), (4).

This report recommends a model which has two institutions – one that performs the dispute resolution function and one that performs the enforcement function. Under this model the VEOHRC would continue to provide dispute resolution services as a neutral facilitator, and a new agency would be established. The new agency would be an advocate for the law and concentrate on enforcement without any expectation that it will behave neutrally.¹³⁹

This model is not foreign to the Australian anti-discrimination landscape. Since 2010 the Fair Work Ombudsman has had the power to enforce the prohibition of discrimination in s 351 of the *FWA* and pursue a range of penalties against non-compliant employers.¹⁴⁰ The Fair Work Commission, a separate agency, is responsible for receiving claims and attempting to resolve them through conciliation.¹⁴¹ Employees can pursue their claim in the federal courts if conciliation fails.

Some of the benefits of having a public agency charged with enforcing the law are: it raises the law's profile; the agency is better placed than an individual to achieve a remedy which benefits a group; it encourages voluntary compliance by increasing the threat that action will be taken against non-compliant organisations; it increases access to justice by helping complainants to pursue their claim; and it reminds the community that discrimination still exists but something is being done to address it.

Recommendations

- There should be a statutory agency that can enforce the law by initiating claims in its own name and by providing complainants with legal and financial assistance to pursue their claim.
- The agency should have the power to investigate allegations of discrimination. Following an investigation, the agency should have a range of escalating powers available to it ranging from working with an organisation to ensure compliance voluntarily by providing advice and education, through to accepting enforceable undertakings, issuing a compliance notice and, ultimately, pursuing court action and the imposition of sanctions.

6 CONCLUSION

This project has examined the strengths and weaknesses of the new dispute resolution model used in the *EOA2010* and offered some suggestions for how the model could be improved to shift the burden of eliminating discrimination away from the individual. It has suggested enhancing the existing system by introducing a statutory agency which has the power to enforce the law by assisting individual complainants with their claims and working with organisations to ensure that they are compliant.

While it is fundamental that each individual has access to an effective dispute resolution process for resolving their discrimination complaint, the limitations of this system in tackling widespread, entrenched discrimination must be acknowledged. We need to examine the overall structure of the enforcement model used in Victoria (and, indeed, throughout the country) and begin the conversation about the best way of improving it so that we can tackle ongoing discrimination and inequality in the most effective way.

¹³⁹ I have argued elsewhere that enforcement should be undertaken strategically to maximise resources: Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36 *Monash University Law Review* 103, 114–16.

¹⁴⁰ *FWA* ss 539, 682.

¹⁴¹ *FWA* s 595.



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