Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution

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1. Introduction

Discrimination jurisdictions in Australia emphasise informal dispute resolution.[1] Their complaint-handling procedures focus on the processing of complaints through confidential mechanisms of 'investigation' and 'conciliation' rather than adjudication.[2] As Astor and Chinkin note, '[t]he aim ... is to challenge discrimination by an informal and consensual process involving negotiation and agreement wherever it is possible to do so.'[3] It is generally only where conciliation is thought to be inappropriate, or has been tried unsuccessfully, that a complaint

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1 The statutory schemes referred to are: *Racial Discrimination Act* 1975 (Cth) (hereinafter *RDA*); *Sex Discrimination Act* 1984 (Cth) (hereinafter *SDA*); *Disability Discrimination Act* 1992 (Cth) (hereinafter *DDA*); *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (hereinafter *HREOCA*); *Anti-Discrimination Act* 1977 (NSW) (hereinafter *ADA* (NSW)); *Equal Opportunity Act* 1995 (Vic) (hereinafter *EOA* (Vic)); *Anti-Discrimination Act* 1991 (Qld) (hereinafter *ADA* (Qld)); *Equal Opportunity Act* 1984 (SA) (hereinafter *EOA* (SA)); *Equal Opportunity Act* 1984 (WA) (hereinafter *EOA* (WA)); *Discrimination Act* 1991 (ACT) (hereinafter *DA* (ACT)); *Anti-Discrimination Act* 1992 (NT) (hereinafter *ADA* (NT)); *Anti-Discrimination Act* 1998 (Tas) (hereinafter *ADA* (Tas)).

2 Note that the federal legislation refers to an 'inquiry' rather than an 'investigation'. The relevant provisions are: *RDA* s20(1)(a), s21, s24; *SDA* s48(1)(a), s49(1), s52; *DDA* s67(1)(a), s68, s71; *HREOCA* s8(6), s11(1)(f), s20, s31(b), s32; *ADA* (NSW) s89, s92; *EOA* (Vic) Part 7 Div 3 (note these provisions do not explicitly provide for investigation); *ADA* (Qld) Chap 7 Part 1 Div 2 and Div 3 (which provides for conciliation only after the Commissioner has conducted an investigation and is satisfied that a contravention of the Act happened or is likely to happen: s155(4)); *EOA* (SA) s94, s95(3); *EOA* (WA) s84, s91; *DA* (ACT) ss73–75, ss83–84; *ADA* (NT) Part 6 Div 2 and Div 3 (a complaint proceeds to conciliation only where the Commissioner has formed the view that there is prima facie evidence to substantiate the complainant's allegations and that it can be resolved by conciliation: s76(1)); *ADA* (Tas) Part 4 Div 2 and Div 3.

3 Hilary Astor & Christine Chinkin, *Dispute Resolution in Australia* (1992) at 261.

may be pursued to adjudication before a tribunal.[4] In practice only around 5 per cent of complaints in Australia proceed to such a hearing.[5] The vast majority of claims go no further than investigation and/or conciliation.

The use of informal dispute-handling processes in discrimination jurisdictions is part of a broader-based adoption in the Anglo-Australian legal system (and elsewhere) of what has become known as alternative dispute resolution (hereinafter 'ADR').[6] The advantages of alternative methods over the formal court system are said to be numerous. They include reduced costs both to the parties and to the state, a faster resolution of disputes and, usually, confidentiality. In addition, ADR is said to provide a non-adversarial forum, with the possibility of more flexible outcomes and the potential to minimise the damage caused to longer term relationships between the parties involved in the conflict.[7] Importantly in relation to discrimination jurisdictions, informal processes are seen as providing less alienating and hostile forums for the intended beneficiaries of discrimination rights, namely women, people with disabilities and the members of outsider racial, ethnic and sexual preference groups.[8]

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4 Note however that vilification complaints in NSW may bypass conciliation where the President forms the view that an offence of serious vilification has been committed: *ADA* (NSW) s89B. Under the Victorian Act some complaints (those which are said to raise issues of important public policy) may bypass conciliation and be referred directly to the Victorian Civil and Administrative Tribunal: *EOA* (Vic) s111.

5 Rosemary Hunter & Alice Leonard, 'Sex Discrimination and Alternative Dispute Resolution: British Proposals in Light of International Experience' [1997] *Public Law* 298 at 299. Thornthwaite found that in the first 10 years of operation, around 6 per cent of employment complaints under the *ADA* (NSW) were referred to the Equal Opportunity Tribunal for adjudication: Louise Thornthwaite, 'The Operation of Anti-Discrimination Legislation in New South Wales in Relation to Employment Complaints' (1993) 6 *AJLL* 31 at 33.

6 Although the ADR movement as such is a relatively recent phenomenon, the idea of dispute resolution structures outside formal litigation is, of course, not new either in this country or in the English common law tradition. See Larissa Behrendt, *Aboriginal Dispute Resolution* (1995), especially 19–22; Astor & Chinkin, above n3 at 5–6.

7 See generally, Astor & Chinkin, above n3 at 12–13, 42–43; Hunter & Leonard, above n5 at 302–305; Annemarie Devereux, 'Human Rights By Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7 *ADRJ* 280 at 283; National Alternative Dispute Resolution Advisory Council (hereinafter 'NADRAC'), *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper (Canberra: NADRAC, 1997) at 16–17, 36–38; Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Canberra: AJAC, 1994) at 278; Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: Discussion Paper No 4: Methods of Dispute Resolution* (Canberra: AGPS, 1991) chap 3; Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) at 136.

8 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) at 148. See also Devereux, above n7 at 283; NADRAC, above n7 at 17.

Informalism is not, however, without its detractors. ADR has been the subject of wide-ranging critiques in the overseas and domestic literature.[9] In the Australian context of discrimination law and practice, scholars, legal practitioners and discrimination agencies have focused their concerns on:

- power dynamics between complainants and respondents and the impact of these forces on the outcomes of conciliation;
- the individualised focus and reactive (rather than proactive) model of dispute resolution encompassed in the jurisdictions;
- increasing formalism in conciliation conferences and the role of lawyers in this;
- the nature of a confidential process in privatising conflict and behaviour from public scrutiny and approbation; and
- different ways in which outcomes and success in these jurisdictions may be measured.

The objective of this article is to explore complaint-handling processes in the NSW discrimination jurisdiction. The article suggests that contrary to much of the rhetoric of ADR, 'investigation' and 'conciliation' in NSW contain traces of a Western adjudicative tradition. The article seeks to show that adversarial ideologies, and in particular the centrality accorded to procedural fairness, and the construction of the parties as formally equal individuals who 'drive' the dispute resolution processes to a conclusion, appear to be present, in a shadow form, in the handling of complaints by the Anti-Discrimination Board (NSW) (hereinafter 'the Board'). Given that informalism was adopted in discrimination jurisdictions out of a recognition that formalism, with its adversarial culture, was inappropriate in this area of law, an appearance of the adversarial ideal is a worrying, although not new, observation. In her empirical study of the NSW, Victorian and South Australian discrimination jurisdictions conducted in the mid 1980s, Thornton notes that in relation to conciliation, 'in practice, ... informalism is being subtly transformed by creeping legalism.'[10] The presence of lawyers, particularly those acting for respondents, has provided much of the impetus for this change. Thornton describes how formalism was 'percolating' into conciliation processes.[11] Indeed as she notes, the Board has recognised such a phenomenon since at least 1984.[12] This

9 In relation to Australian work, see, for example Astor & Chinkin, above n3 at 12–24; Thornton, above n8; Senate Standing Committee on Legal and Constitutional Affairs, above n7 at chap 6. The overseas literature is extensive. See for example, Owen M Fiss, 'Against Settlement' (1984) 93 *Yale LJ* 1073; Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' [1985] *Wis LR* 1359; Tina Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale LJ* 1545; Sara Cobb & Janet Rifkin, 'Practice and Paradox: Deconstructing Neutrality in Mediation'(1991) 16 *Law and Social Inquiry* 35; Lawrence Bobo, 'Prejudice and Alternative Dispute Resolution' (1992) 12 *Studies in Law, Politics and Society* 147; Richard Abel (ed), *The Politics of Informal Justice* Vol 1 (1982); Christine Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (1985); Roger Matthews (ed), *Informal Justice?* (1988).

10 Thornton, above n8 at 162–163.

11 Thornton, above n8 at 164.

12 Thornton, above n8 at 165 referring to the Anti-Discrimination Board, *Annual Report 1983–1984* (Canberra: AGPS, 1984).

article revisits Thornton's observations by unpacking, in more recent times, the dispute resolution processes of the NSW Board.

This article draws on empirical research conducted for an earlier project examining a group of complaints lodged under the *Anti-Discrimination Act* 1977 (NSW) (hereinafter *ADA* (NSW).[13] The complaints examined were those lodged by women under the homosexuality discrimination and vilification provisions in the NSW Act. The confidential case files of such complaints closed between January 1993 to February 1997 were examined. This totalled 50 case files. The Board opens a case file for each complaint it receives. These files contain correspondence, notes of telephone conversations and related documents. The files examined in the study covered complaints lodged by women solely under the homosexuality discrimination and vilification provisions and in addition, those lodged under these provisions and another ground. Some interviews of Board staff were conducted and the Board's Complaint Handling Manual (hereinafter 'the Manual') was examined. This document, issued to all officers in the Board's Complaints Resolution Branch, contains detailed instructions on how to go about the tasks of investigation and conciliation. Given that the Board processes homosexuality discrimination and vilification complaints in the same way as it handles complaints lodged under other grounds in the NSW Act,[14] the 50 case files in the study are indicative of wider practices and themes in discrimination and vilification complaint handling by the Board.[15]

This article turns next to outline the identifying characteristics of the adversarial form of litigation. The adversarial ideal contains a number of key themes that are important to identify for the purposes of this article. Following this, the NSW statutory provisions about investigation and conciliation are examined. This material reveals the relatively open-textured character of this set of constraints on the Board. The article then moves on to discuss other constraints on how the Board goes about fulfilling its statutory tasks of investigation and conciliation. Next, the article draws on the empirical work described above to unpack the processes of investigation and conciliation by adopting two foci: first, what the Board does (and does not do) and secondly, the roles of the parties in these processes. This unpacking of investigation and conciliation takes place in two related stages, the first being a discussion of the empirical findings and the second, an analytical examination of those findings by developing the earlier material on adversarial values.

13 The primary results of this research are reported in Anna Chapman & Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21 *SLR* 525.

14 Interview with the Manager, Complaints Resolution Branch, Anti-Discrimination Board, 22 August 1997.

15 Although it is possible that there are differences from ground to ground in the ways in which complaints are handled, perhaps because different grounds may give rise to different issues, the empirical data and other material analysed provided no evidence of this occurring.

2. *Adversarial Values*

In common with other legal systems characterised by an English common law tradition, the Anglo-Australian system draws on an adversarial, as distinct from an inquisitorial, tradition of adjudication. Although the adversarial system applies technically to only a small area of dispute resolution (court trials), as the Australian Law Reform Commission notes, it has extensive impact on all forms of dispute resolution in Australia,[16] presumably including ADR. Justice Ipp of the Supreme Court of Western Australia has written that '[o]ur adversarial traditions are deeply embedded in the consciousness of the people. The adversarial process is irretrievably part of our legal system and its basic structures are part of the very fundament of our democratic life.'[17]

The adversarial tradition in Australia, as elsewhere, is dynamic and in some senses fuzzy. It is an ideal or philosophy of dispute resolution that centers on three interrelated aspects: the importance accorded to the parties in the processes (through their advocates), the significance of due process and the relatively passive role of the adjudicator or fact finder (judge or jury).[18] Zeidler provides a useful, although now somewhat dated, analogy to assist in describing the adversarial system in Australia and England. He likens civil litigation to a train traveling along its track. Both parties are the drivers and the 'signalmen [sic]' of the train, determining the speed of the train, at which stations to stop (though there are some compulsory stops), and how to set the points. The final destination of the train is the due process of the law.[19]

Zeidler's analogy emphasises party control and the importance of due process. In adversarial theory, it is the parties (through the use of advocates) that are said to be primarily responsible for the course of the litigation. The parties investigate the

16 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (1997) at para 1.13.

17 Justice David Ipp, 'Reforms to the Adversarial Process in Civil Litigation — Part 1' (1995) 69 *ALJ* 705 at 706. See also Stephen Bottomley & Stephen Parker, *Law in Context* (2nd ed, 1997) at 110; Australian Law Reform Commission, above n16, para 1.10; Thornton, above n8 at 173–175.

18 See generally Stephen Landsman, *The Adversary System: A Description and Defense* (1984); Stephen Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication* (1988); Lon L Fuller, 'The Adversary System' in Harold Berman (ed), *Talks on American Law* (1972) at 35; Neil Andrews, *Principles of Civil Procedure* (1994) at 33–53; Jenny McEwan, *Evidence and the Adversarial Process: The Modern Law* (1992) at 3–29; Mirjan Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *U Pen LR* 506 at 555–577; Richard Eggleston, 'What is Wrong With the Adversary System?' (1975) 49 *ALJ* 428; Mirjan Damaska, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 *Yale LJ* 480; W Zeidler, 'Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure' (1981) 55 *ALJ* 390; Ellen E Sward, 'Values, Ideology, and the Evolution of the Adversary System' (1989) 64 *Indiana LJ* 301 at 312–313; Justice David Ipp, 'Reforms of the Adversarial Process in Civil Litigation — Part 1' (1995) 69 *ALJ* 705 at 712–717; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) at paras 1.116 to 1.134, 1.143, 3.30 to 3.41.

19 Zeidler, above n18 at 391–392. Zeidler uses this analogy to compare and contrast the 'train' of civil law tradition found in Germany.

behaviour alleged, decide whether and how to initiate (or defend) legal action, how and when to compile the legally relevant material and what evidence and arguments to put forward. As Fuller has noted, the task of the advocate is to persuade the judge. 'He [sic] is not expected to present the case in a colorless and detached manner, but in such a way that it will appear in that aspect most favorable to his [sic] client.'[20] The idea of active party responsibility for the course of the litigation remains fundamental to the adversarial ideal.[21]

Due process is the idea of a framework of structured proceedings.[22] Landsman refers to rules of procedure, evidence and ethics (of counsel) which not only move the dispute towards a 'climatic confrontation between the parties' in the form of a hearing but also ensure, through for example, restrictions on cross-examination, that this 'confrontation' is a fair one between the parties.[23] For Zeidler, the due and equitable process of the law is the endpoint of litigation.[24]

Much writing on the adversarial system describes judges as 'neutral and passive', and sometimes as 'detached'.[25] In Zeidler's train analogy, the adjudicator's role would be to ensure that the train makes the compulsory stops. The task of judging is described in the literature as akin to being an 'umpire' or 'referee' in the litigation 'contest' between the parties.[26] This sporting metaphor portrays the judge as a neutral and distanced outsider, whose function is to 'keep the parties to the rules' (of procedure, evidence and possibly professional ethics) and thereby ensure that a fair competition results.[27] Other writings de-emphasise the idea of judicial passivity, describing judges as potentially fulfilling a more active role, a role that involves them facilitating the fuller achievement of the other elements of the adversarial system — due process and party participation.[28]

Commentators agree that it is increasingly difficult to identify a legal system that adheres strictly to the adversarial ideal, even if that philosophy could itself be articulated in an unproblematic way.[29] Formal court systems in the UK, Australia

20 Fuller, above n18 at 36.

21 Stephen Landsman, 'The Origins and Elements of the Adversarial System' in Kathy Laster, *Law as Culture* (1997) at 254–257; Andrews, above n18 at 34; Fuller, above n18 at 36; Australian Law Reform Commission, above n16 at para 1.5.

22 Ipp, above n18 at 712. See also Landsman, *The Adversary System: A Description and Defense*, above n18 at 4–6.

23 Landsman, *The Adversary System: A Description and Defense*, above n18 at 5.

24 Zeidler, above n18 at 392.

25 Landsman, *The Adversary System: A Description and Defense*, above n18 at 1–4; McEwan, above n18 at 4–5, 14 (who at p14 describes that the 'passive, disinterested role of the judge ... is a *sine qua non* of the adversarial theory'); Andrews, above n18 at 34, 50.

26 *Jones v National Coal Board* [1957] 2 QB 55 at 63 per Lord Denning; *Laker Airways Ltd v Dept of Trade* [1977] 2 All ER 182 at 208 per Lawton LJ; *Whitehorn v R* (1983) 49 ALR 448 at 467 per Dawson J all quoted in Bottomley & Parker, above n17 at 4–5; Zeidler, above n18 at 394 (who describes the English judge as an 'umpire sitting at the sidelines watching the lawyers fight it out and afterwards declaring one of them the winner'); McEwan, above n18 at 4–5.

27 McEwan, above n18 at 4.

28 Ipp, above n18 at 712–713; McEwan, above n18 at 4–5; Fuller, above n18 at 46–47.

29 Andrews, above n18 at 33; Australian Law Reform Commission, above n16 at para 2.5; Australian Law Reform Commission, above n18 at para 1.116.

and the US increasingly include significant non-adversarial elements within their frameworks.[30] Judges in these countries are being asked to adopt more interventionist and managerial functions along the lines of judges in the civil law tradition, unbridled competition between advocates has been tempered and ADR is increasingly annexed to courts. Certainly, many of these developments have been present for some time, although the pace and range of law reform initiatives in this area has increased in the last few decades. Although these initiatives may have rounded off the rougher edges of the adversarial method, the ideal and framework of adversarialism remain strong reference points in both Australian legal culture and the procedures of litigation, as evidenced in the opening paragraph of this part of the article.

3. *The Statutory Rules on Dispute-handling in NSW*

The NSW legislation, in common with other Australian discrimination statutes, contains broad directives rather than detail on complaint handling procedures.[31] It provides for complaints, including representative and joint complaints, to be lodged with the President of the Anti-Discrimination Board.[32] Unlike some other discrimination jurisdictions in Australia, there is no statutory obligation on the President / Board to assist complainants to formulate their complaint.[33] The Act obliges the President to 'investigate' each complaint lodged,[34] and where he or she forms the view that a complaint may be resolved by 'conciliation', to so endeavour to resolve it.[35] Complaints that are found by the President to be 'frivolous, vexatious, misconceived or lacking in substance' may be declined on that basis.[36]

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30 On the UK system see Woolf, above n7; On the US system see Ellen E Sward, 'Values, Ideology, and the Evolution of the Adversary System' (1989) 64 *Indiana LJ* 301. On the Australian system see Australian Law Reform Commission, above n16 at chap 2; Australian Law Reform Commission, above n18 at chap 1 and esp para 1.153; Access to Justice Advisory Committee, above n17; Helen Stacy and Michael Lavarch (eds), *Beyond the Adversarial System* (1999); Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (1999).

31 These rules have been the subject of an extensive review: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* Vol 2 Report No 92 (1999) at para 8.1 to 8.232.

32 *ADA* (NSW) s88(1).

33 See for example *EOA* (Vic) s106, *DDA* s69(2). The Law Reform Commission (NSW) has recommended that such a provision be enacted into the NSW Act: New South Wales Law Reform Commission, above n31 at para 8.41 to 8.42.

34 *ADA* (NSW) s89(1). Black argues in the Canadian context that the objective of imposing a duty on statutory agencies to investigate complaints of discrimination arises out of a recognition of the public interest in the process so that the burden of pursuing a complaint should not fall entirely on the complainant's shoulders. Black, *Employment Equality: A Systemic Approach* (1985) at 50. On this point, see also Thornton, above n8 at 157.

35 *ADA* (NSW) s92. The President has no power to initiate an investigation and pursue a matter to a hearing in the absence of a complaint. Amendment of the Act to provide such self-initiating powers has been recommended by the Board: New South Wales Anti-Discrimination Board, *Balancing the Act: A Submission to the NSW Law Reform Commission's Review of the Anti-Discrimination Act 1977 (NSW)* (1994) at 178.

36 *ADA* (NSW) s90(1).

In practice, most of the President's complaint handling tasks are carried out by some 13 officers employed in the Board's Complaints Resolution Branch.[37] There is no clear dividing line between investigation and conciliation, and in New South Wales, the same officer may conduct both.[38] The NSW statute, like discrimination legislation throughout Australia, does not define the words 'investigation' or 'conciliation'. It does however provide some inclusive indication of what this might involve by giving the President/ Board specific powers to convene compulsory conferences for the purpose of conciliation.[39] In addition to convening conferences, the President has a non-delegable power to seek interim orders (for the purpose of maintaining the status quo between the parties).[40] At the time the research was conducted, the body with the power to issue such orders was the Equal Opportunity Tribunal (NSW) (hereinafter 'Tribunal').[41] Beyond these explicit powers, the mechanics of 'investigation' and 'conciliation' are left unspecified by the statute. There are moreover no generally accepted definitions of these terms in the Australian (or overseas) literature.[42]

The NSW Act provides that '[e]vidence of anything said or done in the course of conciliation ... shall not be admissible in subsequent proceedings.'[43] Although arguably this prescription on confidentiality relates only to compulsory conciliation conferences,[44] the Board takes a broader view, insisting that all steps from the lodgement of a complaint to the closure of the file remain confidential and, to the extent that the Board does permit information to be released into the public realm, that it be presented in a way that does not identify any parties or other people involved in the dispute. The rationale is that respondents would decline to participate in the processes, and complainants would be reluctant to come forward, were confidentiality not assured.[45]

The legal rules in NSW, in common with other discrimination legislation in Australia, provide that complainants and respondents have no right to be represented in 'conciliation proceedings before the President' except with the leave of the

37 The power of the President to delegate his/her functions is contained in *ADA* (NSW) s94A.

38 New South Wales Law Reform Commission, above n31 at para 8.93.

39 *ADA* (NSW) s92(2). Note that the President lacks the power to require the production of documents during investigation and conciliation. Both the Board and the Law Reform Commission (NSW) have recommended that such a power be given to the President: New South Wales Anti-Discrimination Board, above n35 at 191–192; New South Wales Law Reform Commission, above n31 at para 8.66 to 8.78.

40 *ADA* (NSW) s89A.

41 Prior to October 1998 the relevant tribunal was the Equal Opportunity Tribunal. The functions of this tribunal have been subsumed by the Administrative Decisions Tribunal (NSW): *Administrative Decisions Tribunal Act* 1997 (NSW). On this new tribunal, see generally Jill Anderson, 'Something Old, Something New, Something Borrowed ... The New South Wales Administrative Decisions Tribunal (NSW)' (1998) 5 *AJ Admin L* 97.

42 Thornton, above n8 at 143–144; Astor & Chinkin, above n3 at 61–64; David Bryson, 'Mediator and Advocate: Conciliating Human Rights Complaints' (1990) 1 *ADRJ* 136 at 137–138. NADRAC has formulated a definition of 'statutory conciliation': NADRAC, above n7 at 202–203 (Appendix A); New South Wales Law Reform Commission, above n31 at para 8.92.

43 *ADA* (NSW) s94(2).

44 See Barbour J of the New South Wales Equal Opportunity Tribunal in *Najdovska v Australian Iron & Steel* (1985) EOC 92-120 discussed in Thornton, above n8 at 150.

45 New South Wales Anti-Discrimination Board, above n35 at 188–189, 232; New South Wales Law Reform Commission, above n31, para 8.97 to 8.116.

Board.[46] The scope of this rule is not immediately apparent. The Board's Complaint Handling Manual discusses the question of permitting legal representation only in relation to conciliation conferences. It sets out a number of factors that the officer of the Board ought to have regard to in exercising the discretion to allow representation in such a conference. These matters relate to an assessment of questions of fairness and power dynamics between the parties, as well as evaluating whether the representative is likely to assist in the resolution of the complaint.[47]

The NSW statutory rules are open-textured in the sense of leaving much of the procedures of 'investigation' and 'conciliation' to the discretion of the President / Board.[48] Under these rules the Board might adopt an active investigatory stance, by, for example, turning up at the respondent's premises unannounced for the purposes of seeking permission from the respondent to interview employees and view documents. The Board might seek to interview other people who the complainant and respondent identify as having knowledge of the alleged conduct. Alternatively the Board might form the view that the most appropriate way to proceed is to stand back from the dispute, place the responsibility on the complainant to gather the relevant material, and use persuasion and encouragement to get a respondent to a conciliation conference, with compulsory powers to be called upon as a last resort. The point being made here is that a range of different approaches to 'investigation' and 'conciliation' are open under the NSW statutory rules. It is suggested that other interrelated factors impose considerable constraint on how the Board exercises its dispute-handling functions within this broad band established by the statutory rules. These matters are examined next. They appear to go a long way in explaining why (and how) informalism in the NSW jurisdiction contains traces of adversarial methodology.

4. *Related Constraints on the Board's Discretion*

No doubt a number of different interrelated pressures other than the statutory rules shape how the Board fulfills its obligations to conduct 'investigation' and 'conciliation' under the NSW statute. It is suggested that several matters are of relevance. Of note is the Federal Court decision in *Koppen v Commissioner for Community Relations*.[49] This case involved a complaint of racial discrimination lodged by six Aboriginal and Torres Strait Islander people against the owner of a Cairns nightclub who had refused them entry. A compulsory conciliation conference

46 *ADA* (NSW) s93.

47 NSW Anti-Discrimination Board Complaints Resolution Branch, *Complaint Handling Manual* (1997) at 103–105; New South Wales Anti-Discrimination Board, above n35 at 192.

48 On the open-textured nature of such legislative provisions, see Thornton, above n8 at 157; Rosemary Hunter, *Indirect Discrimination and the Law* (1992) at 263; Rosemary Hunter & Alice Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases: Working Paper No 8* (Melbourne: Centre for Employment and Labour Relations Law, University of Melbourne, 1995) at 1. On the discretion of the HREOC, see Meredith Wilkie, 'Australia's Human Rights and Equal Opportunity Commissions' in Martin MacEwen (ed), *Anti-Discrimination Law Enforcement: A Comparative Perspective* (1997) at 117–118.

49 (1986) 11 FCR 360 (hereinafter *Koppen*).

was called under the *Racial Discrimination Act* 1975 (Cth). The officer presiding at the conference, an Aboriginal person, commented that her daughters had been refused entry to that nightclub. This statement was found to have been made in the context of discussions about whether the club imposed a general ban on admission of Aboriginal and Islander people. The application by the nightclub proprietor before the Federal Court (Spender J) argued that a breach of natural justice had occurred in that the officer had shown herself to be affected by bias. The Federal Court held that officers presiding during compulsory conciliation conferences must observe the rules of natural justice. In the view of Spender J in this case, the comments of the officer amounted to a breach of natural justice as they would, in the context in which they were made, lead 'a reasonably minded person'[50] to conclude that the officer was of the opinion that there was a general ban on entry for Aboriginal and Islander people. Spender J expressed the view that the conciliator had impermissibly 'actively enter[ed] the controversy between the parties.'[51]

This decision can be read in a number of different ways. At its most narrow, it stands for the proposition that certain principles of procedural fairness must be observed during compulsory conciliation conferences held under the provisions in the *Racial Discrimination Act* 1975 (Cth). These provisions require, as a prerequisite to initiating a hearing before the Human Rights and Equal Opportunity Commission (hereinafter 'HREOC'), that a notice be issued by the Commissioner recording his or her decision not to inquire, or not to continue to inquire, into the complaint.[52] It might be argued that as the *ADA* (NSW) does not contain analogous provisions for certification,[53] *Koppen* is of limited relevance. Commentators though take the view that *Koppen* has had a significant influence on the development of conciliation processes in discrimination jurisdictions.[54] Thornton argues that *Koppen* has inhibited officers from exercising discretion which might accord the complainant substantive assistance during conciliation.[55] In addition, Thornton argues that *Koppen* has lead to respondents being more prepared to insist on being granted leave to be represented by lawyers.[56] Interestingly, *Koppen* appears in the discussion of conciliation in the NSW jurisdiction in a leading

50 Id at 373.

51 Ibid. Spender J clearly suggests that the involvement of Aboriginal conciliation officers in race discrimination complaints runs the risk that the officer will not be neutral. The assumption behind this view is that only conciliators who are members of dominant groups (ie, Anglo-Celtic, male, heterosexual and without a disability) can, or will be, neutral. Such an assumption is clearly indefensible. See further Thornton, above n8 at 163–164.

52 *RDA* s24(3)–(5A).

53 Neither do any other discrimination statutes now contain such provisions: Hunter, above n48 at 263.

54 Hunter describes *Koppen* as remaining 'very influential'. She points to the public statements by agencies asserting their role as neutral third party conciliators as illustrative of the continuing influence of *Koppen*: Hunter, above n48 at 263. See also Thornton, above n8 at 163–164.

55 Thornton, above n8 at 163–164.

56 Ibid. Bayne is critical of Thornton's work, arguing that the principles of procedural fairness ought to be developed and applied more fully in discrimination jurisdictions: Peter Bayne, 'Natural Justice, Anti-Discrimination Proceedings and the Feminist Critique' (1995) 3 *AJ Admin L* 5.

practitioner's loose-leaf service.[57] Additionally *Koppen* is discussed in the Board's Complaint Handling Manual, in the chapter titled 'General Principles', as standing for the proposition that the rules of procedural fairness apply to conciliation conferences. Whether this statement relates to compulsory conferences only or includes voluntary ones is not specified.[58] In the following page the Manual discusses *Re NSW Corporal Punishment in Schools Case*[59] as standing for the principle that the rules of natural justice do not apply in relation to investigations. The Manual concludes the discussion with the statement:

> but the Board considers that the rules [of natural justice] should be followed wherever possible in the complaint handling process. As the integrity of the complaint handling process relies on the complaint handler being fair and unbiased, all our dealings with the parties must be governed by the rules of procedural fairness.[60]

The emphasis given in the Manual to *Koppen* suggests that this case has played an important role in the Board's shaping of its policy about procedural fairness in investigation and conciliation.

It is suggested that other decisions may have operated to reinforce this approach of the Board in relation to procedural fairness. In *Hall & Ors v Sheiban & Anor*,[61] another relatively early and widely discussed decision, Einfield J, the (then) President of the HREOC was very critical of the approach taken by the NSW Board in a group of three complaints lodged under the *Sex Discrimination Act* 1984 (Cth). The NSW Board had handled the complaints as delegate of the federal Sex Discrimination Commissioner.[62] Einfield J described the steps taken by the Board from the receipt of the complaints to the holding of a conciliation conference. The sentiment about what was, according to his honour inappropriate about the Board's approach is clearly conveyed in the following quote from the decision:

> At no time in the period had the respondent apparently been advised, as had the complainants, that the services of the Board were available to assist him to compile his reply or to advise him on ways in which conciliation or settlement might be able to be effected. Nor was he apparently advised that the claims were small and of the kind that ought to be settled without the need for this hearing, and its attendant expenses and uncontrollable and no doubt embarrassing public exposure. In other words, the Board appears to have been presenting itself not as a conciliator or honest broker, but as an advocate, even aggressive partisan, for these complainants.[63]

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57 *Australian & New Zealand Equal Opportunity Law and Practice* (CCH Looseleaf Service, 2000) ¶ 85–780.

58 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 6.

59 (1986) EOC 92-160 at 76,584.

60 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 7–8.

61 (1988) EOC 92-227 (hereinafter *Hall v Sheiban*).

62 The cooperative arrangement between the NSW Board and HREOC ceased in the 1992–1993 year: New South Wales Anti-Discrimination Board, *Annual Report 1992–1993* (Sydney: NSW Anti-Discrimination Board, 1994) President's Introduction.

63 Above n61 at 77,141.

Due to the nature of the proceedings before him, Einfield J did not make any findings as such about the Board's handling of the complaint. His disapproval though of the procedures of the Board is clear. Although, as is noted in commentary on the decision, Einfield J did not explicitly refer to natural justice, such concerns seem clearly to frame his criticism of the Board's investigation and conciliation in the case.[64] Later in the decision his honour stated:

> [T]he impartiality of the Sex Discrimination Commissioner's delegates in investigation and conciliation of complaints under this Act must be scrupulously maintained. These delegates are not free agents to pursue causes, and may not be advocates for parties within the Act's ambit, however honourable, justified or sympathetic they may feel in relation to particular matters being handled by them. All parties or potential parties are entitled to courteous service and support.[65]

The complainants sought judicial review of the orders of Einfield J before the Full Federal Court.[66] His honour's findings relating to the meaning of sexual harassment, and his decision to not award the complainants damages, were overturned by the Full Court. Einfield J's views about the Board's investigation and conciliation of the complaints were not challenged, nor canvassed, in the review proceedings. Although the section on procedural fairness in the Board's Manual only refers to *Hall v Sheiban* in relation to Einfield J's criticism of delays in the handling of the complaints,[67] it is suggested that this case, which received considerable attention at the time, is likely to have shaped the Board's handling of complaints in terms of natural justice considerations. Although the attention the case received related primarily to Einfield J's findings on sexual harassment and compensation, the criticism by the HREOC President of the Board was so strong, and the decision so widely discussed in discrimination law circles, it seems implausible that the Board would have remained impervious to the sentiment expressed by Einfield J about complaint-handling.

The presence of lawyers in the complaint-handling processes of discrimination agencies has been seen as a constraining influence on their work. Astor & Chinkin directly link lawyers to the 'importation of an adversarial attitude in conciliation'.[68] Thornton agrees that the presence of lawyers is antipathetic to the objectives of informalism.[69] The continuing content and approach of much Australian legal education means that lawyers are still more familiar and comfortable with the discourse of rights and an adversarial culture than they are with ADR and conciliation.[70] In the Chapman & Mason empirical study described

64 CCH Australia Limited, above n57 at para 84–886.

65 Above n61 at 77,142.

66 *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) 20 FCR 217.

67 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 8.

68 Above n3 at 269.

69 Thornton, above n8 at 164–165.

70 Sam Garkawe, 'Admission Rules' (1996) 21 *Alt LJ* 214. On legal education and adversarial culture, see Australian Law Reform Commission, above n18 at para 3.30 to 3.41.

above, although most complainants and identified respondents did not appear to receive legal advice, respondents were nonetheless more likely to be in receipt of legal representation than were complainants.[71] In addition, it was noted that while complainant solicitors generally had a positive impact on the Board's processes, some respondent lawyers were obstructionist and took an adversarial approach.[72] It is respondent lawyers, rather than solicitors acting for complainants, who are more likely to insist on strict principles of procedural fairness being observed because such an approach is likely to be of benefit to a respondent. It does moreover seem probable that the constraining influence of the legal profession over investigation and conciliation by the Board extends to cases where lawyers are not present, for the reason that a solicitor may, at any time, be retained by a party.[73]

In addition, the ever present possibility of a tribunal or court proceeding presents a constraining influence over all discrimination jurisdictions.[74] In recent years there appears to have been a trend of cases going to the Federal Court, High Court and Victorian Supreme Court which have involved largely successful challenges to the decisions and approaches taken by the HREOC and Victorian tribunal.[75] Although this appears to have occurred mostly at the federal level and to a lesser extent in Victoria, it would seem likely that all agencies and tribunals are now more attuned to the possibility of finding their approaches under challenge in courts of superior jurisdiction. Such a recognition is likely to present a constraining influence on how agencies, including the Board, go about investigating and conciliating complaints lodged with them.

Two further matters appear to form part of the constraining influences on the Board. The Board's financial resources relative to its growing case load and other activities would be expected to influence how it goes about its complaint-handling tasks, and in particular its ability to allocate resources to investigations of complaints. The NSW Board has written that its 'effectiveness in administering the Act is severely

71 In 12 per cent of cases (6 cases) complainants appeared to receive advice from a lawyer. In contrast, respondents appeared to received external legal advice in 35 per cent of cases where respondents were contacted (7 cases). Chapman & Mason, above n13 at 551. In a study of sex discrimination complaints, Hunter & Leonard found that respondents were more likely than complainants to have legal representation in the pre-conciliation conference stage and at the conference, whereas complainants were more likely to have legal representation after the conference had been held: Hunter & Leonard, above n48 at Table 2.2 at 4 and Table 3.4 at 8.

72 Chapman & Mason, above n13 at 552.

73 See above p328–329 for a discussion of the ADA (NSW) legal rules requiring a party to obtain leave in order to be represented in conciliation.

74 Thornton, above n8 at 165.

75 For example, *State of Victoria v McKenna* (2000) EOC 93-043; *State Electricity Commission v Rabel* [1998] 1 VR 102; *Peninsula Golf Club Inc v Corp* (1998) EOC 92-953; *X v Commonwealth of Australia* [1999] HCA 63; *Commonwealth of Australia v HREOC and Stamatov* (1999) EOC 92-967; *Commonwealth Bank of Australia v HREOC* (1997) 150 ALR 1; *Commonwealth of Australia v HREOC and Kelland* (1998) EOC 92-931; *Commonwealth of Australia v HREOC and Anor* (1998) EOC 92-945; *Executive Council of Australian Jewry v Scully* (1998) EOC 92-947; *Department of Veterans' Affairs v Mr & Mrs P* (1998) EOC 92-950; *Commonwealth of Australia v Humphries* (1998) EOC 92-950.

limited by the level of ... resources in all areas of work'.[76] A related matter is that discrimination agencies and tribunals are operating in a different political environment to that which it existed up until the mid 1990s. Government policy at the federal level clearly contains a decreased role for specialised regulatory agencies, particularly those that have a protective function.[77] Although the complexion of the NSW political scene is in many respects quite different to that existing at the federal level, NSW too has seen a decreased role for specialised tribunals with the establishment of the Administrative Decisions Tribunal (NSW) in 1997.[78] This general downgrading of specialist tribunals and agencies may itself further entrench the reified status of the formal court system. It might be expected that this would strengthen the centripetal force of formalism in discrimination complaint-handling processes.

This section of the article has sought to describe the many interconnected factors that appear to impose constraints on how the Board goes about fulfilling its tasks of investigation and conciliation under the NSW Act. In addition to the legislative rules themselves, it is suggested that tribunal and court decisions on the applicability and meaning of procedural fairness, the possibility of a party seeking a tribunal or court hearing, the presence of lawyers in conciliation, and the Board's finite resources, all take effect to impose restraints on how it goes about its complaint-handling functions. The next section of the article draws on the Chapman & Mason empirical work to explore what actually occurs in the name of 'investigation' and 'conciliation' in NSW. This is done by exploring the Board's approach to its complaint-handling functions followed by an examination of the roles of the parties in these processes.

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76 New South Wales Anti-Discrimination Board, above n35 at 199, 234–236. See also New South Wales Anti-Discrimination Board, *Annual Report 1993–1994* (Sydney: NSW Anti-Discrimination Board, 1994) at 9–10; New South Wales Anti-Discrimination Board, *Annual Report 1994–1995* (Sydney: NSW Anti-Discrimination Board, 1995) at 15–16. Resource constraints are also referred to in the Board's 1997–1998 Annual Report where the President describes how '[p]ressures on the entire public sector, in this State and throughout Australia, have seen the Board, like many of its counterparts, required to do more with less. We have been required to work harder, longer and smarter.' New South Wales Anti-Discrimination Board, *Annual Report 1997–1998* (Sydney: NSW Anti-Discrimination Board, 1998) at 2.

77 For example, the role of HREOC in the determination of unconciliated complaints under federal anti-discrimination legislation has been transferred to the Federal Court under the *Human Rights Legislation Amendment Act (No 1)* 1999 (Cth). The functions of the federal Affirmative Action Agency appear to have been reduced under the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) and a reduction in the role of the Australian Industrial Relations Commission was envisaged under the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (Cth). On recent moves to downgrade specialist anti-discrimination tribunals, see Margaret Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of "New Corporatism"' (1999) 23 *MULR* 749 at 758–760.

78 The Administrative Decisions Tribunal (NSW) replaced a number of tribunals in NSW, including the Equal Opportunity Tribunal: *Administrative Decisions Tribunal Act* 1997 (NSW). In Victoria the Equal Opportunity Tribunal has been replaced with the Victorian Civil and Administrative Tribunal: *Victorian Civil and Administrative Tribunal Act* 1998 (Vic). On government plans to amalgamate federal tribunals into a generalised Administrative Review Tribunal, see Australian Law Reform Commission, above n18 at para 9.1.

5. *A Focus on the Board in the Processes of Investigation and Conciliation*

This section of the article seeks to profile the Board's role in investigation and conciliation. Fundamentally the Board appears to take an approach of standing back from the conflict between the parties (as distinct from the complaint). Secondly, the Board's guiding principle in dealing with the parties appears to be an approach of 'same treatment' in relation to them. These matters are explored below. Following this, the adversarial values underlying these practices are drawn out.

A. A Profile of Board Processes

As noted above, the NSW statute requires the President (in effect the Board) to investigate 'each complaint' lodged. The Board's Manual provides considerable specification on how officers are to go about such an investigation. These directions rest on a distinction between investigating 'each complaint' and investigating the conduct described in each complaint.[79] The influence of this differentiation was apparent in the case files examined in the Chapman & Mason study. The Board investigates 'each complaint' in the sense of ensuring, for example, that the allegations fall within its jurisdiction, that there are no obvious exemptions that the respondent could successfully rely on at a hearing, and checking with the complainant whether there are pending actions in other jurisdictions. Although the Board's standard procedure does involve writing to the respondent and asking a series of questions about, for example, the history between the complainant and respondent, and the incidents in dispute, the Board does not, beyond this pro forma letter, carry out an investigation into the behaviour and issues raised in the complaint.[80] For example, in no case did an officer of the Board visit a respondent's premises.[81] In only one case in the study of 50 complaint files did an officer contact a third person who the complainant identified had information relevant to the complaint. This case involved a physical assault on the complainant by a group of men outside an inner city hotel. The Board telephoned a police officer to request a copy of the police statement that the complainant had given about the assault. Apart from this case, it is clear that the complainants in the study bore in effect the full responsibility for gathering the legally relevant information needed to substantiate their allegations.

The approach of the Board in the complaint files examined appears consistent with its general practice in relation to investigation. In 1991 the then President of the Board wrote that 'investigation as we define it involves a determination that the complaint may amount to discrimination as defined in the Act, and a further determination that it is not "frivolous, vexatious, misconceived or lacking in substance"'.[82] More recently in 1994 the Board wrote:

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79 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at chaps 8 and 9. Such a distinction is also apparent in other publications of the Board: Anti-Discrimination Board, above n35 at 186.

80 Respondents are not able to be compelled to address these questions.

81 Writing about the NSW jurisdiction in the mid 1980s Thornton notes that a 'personal visit to investigate' by an officer was common: Thornton, above n8 at 157. Drawing on material up to the end of August 1991, Astor & Chinkin list such visits as one potential method of investigation: above n3 at 265.

82 Steve Mark, 'Is Conciliation of Racial Vilification Complaints Possible?' (1991) 3 *Without Prejudice* 3 at 5.

> Parties occasionally assume that the Board's obligation in investigating a complaint is to gather evidence in support of the complainant's allegations. Rather, the Board's focus is on assisting both the complainant and the respondent to identify and provide the relevant information or evidence that would support their own position.[83]

In the senses described above, the Board does very little by way of 'active' investigation of the alleged behaviour and issues raised in the complaint.[84] This type of approach appears to be common amongst agencies handling discrimination complaints. For example, in their study of sex discrimination complaints lodged with the Victorian and South Australian Commissioners and complaints in the Sydney office of HREOC (from 1989 to 1993), Hunter and Leonard found that in 79.5 per cent of cases, the agency did not contact any potential witnesses (apart from the complainant and respondent).[85]

As noted previously, the NSW Act gives the President power to apply to the Tribunal for an interim order.[86] The purpose of interim orders is said to be to maintain the status quo or preserve the rights of the parties while investigation and conciliation are undertaken.[87] By their nature, interim orders are most likely to take effect to protect the complainant, rather than the respondent, by, for example, requiring that the respondent not dismiss the complainant from employment. It appears that in none of the 50 cases in the Chapman & Mason study was an interim order sought by the President. Nor does any of the material in the case files reveal that steps were taken to consider the question of seeking an interim order.[88] In several cases, applications for interim orders may have been warranted. For example, in two cases the letters of complaint identified, on what appeared to be sound grounds, that dismissal from employment was imminent. Impending loss of job is described in the Manual as the type of situation where interim orders may be considered.[89] In eight other cases an interim order might usefully have been sought

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83 Anti-Discrimination Board, above n35 at 186.

84 In the past the Board has conducted large scale investigations into selected complaints. Astor & Chinkin note that in relation to the groundbreaking case of *Najdovska v Australian Iron and Steel* (1988) EOC 92-104, the Board prepared (in 1984) a lengthy and detailed report on the work practices of the respondent steelworks: above n3 at 265.

85 Hunter & Leonard, above n48 at 14. In her study of conciliation conducted by the HREOC, Devereux describes the Commission's approach as being one of 'minimal intervention' in contrast to 'taking an active conciliatory role in bringing the parties together': Devereux, above n7 at 286.

86 *ADA* (NSW) s89A. And see *ADA* (NSW) s112 on the power of the Tribunal to make an interim order.

87 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 34.

88 The Manual sets out a procedure for Board officers to consider the question of an interim order and then initiate action in this respect if considered appropriate. This procedure involves a number of steps, including that the complaint handler prepare a summary of various information. No such summaries were apparent in the case file material examined in the Chapman & Mason study. It may be that informal action was taken by officers in an attempt, for example, to secure the continued employment of the complainant. This might include convening an urgent conference or discussing the question of potential dismissal directly with the respondent. The taking of such action was not apparent in the case file material examined.

89 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 33.

to stop ongoing harassment of the complainant. The absence of Presidential applications for interim orders may be particularly troubling as the NSW Act does not provide complainants with a right to seek such an order during conciliation. Only the President is empowered to make an application.[90] There is evidence to suggest that NSW is not alone in what appears to be infrequent use of interim orders. In their study of sex discrimination complaints in Victoria, South Australia and the Sydney office of HREOC, Hunter & Leonard found that interim orders were sought in two cases only.[91] Both these cases were in Victoria (where 82 files were examined[92]). They point out that interim orders in the South Australian and federal jurisdictions are of a limited nature, the suggestion being that this might account for their low level of use.[93] Leaving these jurisdictions aside, the rate of interim orders in the NSW jurisdiction does not appear to be in stark contrast to the Victorian position.

Although the holding of a conference is sometimes viewed as the essence of conciliation, empirical evidence reveals that the convening of a conference is probably not the norm in discrimination (and vilification) complaint-handling.[94] Conciliation conferences were held in only seven complaints in the Chapman & Mason study (17.1 per cent of complaints accepted by the Board).[95] Given this, conciliation was largely about the exchange of correspondence, documents and telephone calls. A standard procedure (with pro forma letters) was apparent in the case file material examined. The Board operates on a guiding principle that information supplied by one party ought ordinarily to be provided to the other party. The practice is that an officer should only accept information from a party on the basis that it not be provided to the other party in unusual circumstances, such as where the material involves the medical records of a co-worker of the complainant.[96]

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90 In other jurisdictions complainants are given standing to seek an interim order. See, for example, *EOA* (Vic) s131; *ADA* (Qld) s144; *EOA* (SA) s96(2); *EOA* (WA) s126; *ADA* (Tas) s98; *DA* (ACT) s99.

91 Hunter & Leonard, above n48 at 16.

92 Hunter & Leonard, above n48 at 1.

93 In South Australia, interim orders can only be sought after a case has been referred to the tribunal for hearing and at the federal level, substantial problems exist in enforcement and also availability: Hunter & Leonard, above n48 at 16 and footnotes 29, 30 and 31.

94 The statistics on the holding of conferences do not provide a strong basis for drawing comparisons. Thornthwaite's study however of the NSW jurisdiction from 1977 to 1987 records that conferences were held in approximately half the complaints: Thornthwaite, above n5 at 33. Hunter & Leonard found that in their study of sex discrimination complaints, conciliation conferences were held in less than half the complaints they examined: Hunter & Leonard, above n48 at 14. More recently McNamara's study of racial vilification complaints in the NSW jurisdiction found that conferences were held in 9 per cent of cases only: Luke McNamara, 'Research Report: A Profile of Racial Vilification Complaints Lodged with the New South Wales Anti-Discrimination Board' (1997) 2 *International Journal of Discrimination and the Law* 349 at 359. Devereux found in her study of conciliation conducted by HREOC that conferences were held in less than half the cases she examined: Devereux, above n7 at 287. For other studies, see Chapman & Mason, above n13 at 549.

95 Chapman & Mason, above n13 at 549–550.

96 Interview with the Manager, Complaints Resolution Branch, Anti-Discrimination Board, 22 August 1997.

So, for example, the complainant's allegations (and/or possibly letter of complaint)[97] are included with the Board's letter to the respondent informing the respondent of the complaint and seeking a response. The respondent's response (where there is one) is forwarded to the complainant.

Where conciliation conferences are held, they epitomise the idea of due process. The Manual provides that conference 'proceedings must observe the general rule of equality of treatment for both parties.'[98] Guidelines are provided for the conduct of the conference, including that the parties ought to receive equal (uninterrupted) time in which to state their views. The Manual recommends that the conciliator explain at the commencement of the conference that they are an independent facilitator in the processes of conciliation and are not an advocate for either party.[99]

The Board's view about the issue of providing the parties with legal advice also reveals its approach to its tasks of investigation and conciliation. Although in the Chapman & Mason study officers frequently distributed pamphlets and other documents such as extracts of the legislation, none of the correspondence examined contained advice specific to the case at hand on the merits of a particular argument. In only two case files was there an indication that advice or assistance to the complainant about what she might seek had been given by an officer (this was over the telephone). In some cases officers recommended that complainants obtain legal advice if they were in doubt as to what sort of redress they might pursue. A similar approach by officers to the provision of legal advice and assistance has been noted in other studies. In their examination of procedures in Victoria, South Australia, and the Sydney office of HREOC, Hunter & Leonard found that conciliation officers did not see their role as being to give an opinion on the merits of arguments, or, in Victoria and Sydney, to suggest an appropriate settlement outcome.[100] Such a relatively 'hands off' approach of officers may be a factor in an under-recognition of potential claims of indirect discrimination. Hunter & Leonard found an under-recognition of such claims in the case files in their study.[101] Although it is not possible to give a concluded view on the question,

97 The Manual provides that a copy of the letter of complaint may be supplied to the respondent where requested, proved that there is nothing in the letter of complaint that may jeopardise the possibility of the dispute being resolved: NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 13.

98 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 116.

99 Id at chap 10.

100 Hunter & Leonard, above n48 at 12, 16, 24. The 1994 HREOC national review of its procedures found similarly: HREOC, *National Review of Complaint Handling: Final Report of the Steering Committee* (1994) at 19–20. Thornton found that in relation to her empirical research in the NSW discrimination jurisdiction in the 1980s, officers did not assist complainants in identifying an appropriate sum for compensation. Thornton found that many complainants in her study did not seek damages: Thornton, above n8 at 152. In contrast, in a paper written in the mid 1980s, Pentony describes the practice of the South Australian Commissioner for Equal Opportunity to provide the parties with written advice on the lawfulness of the respondent's conduct. In addition, the Commissioner is said to have often suggested an appropriate settlement to the parties: Patrick Pentony, *Conciliation under the Racial Discrimination Act 1975: A Study in Theory and Practice*, Human Rights Commission Occasional Paper No 15 (1986) at 140–141.

101 Hunter & Leonard, above n48 at 9.

it is believed that claims of indirect discrimination may be found in one quarter of the case files in the Chapman & Mason study. In only one case was indirect discrimination identified on the case file data sheet.[102] It is suggested that officers may have taken the view that providing assistance or advice (solicited or unsolicited) to one party about their potential arguments or claims, or indicating the merits of arguments that have been made would compromise their complaint-handling role. The Manual explicitly warns conciliation officers against 'reaching a conclusion that a respondent has probably breached the legislation, as this could be perceived as bias.'[103] Under an explanation of the principle of impartiality, the Manual states that 'a complaint handler should not volunteer an opinion as to the strength of a complainant's case unless such an opinion is sought by either party.'[104] This appears to leave open a role for officers in providing an opinion where it has been sought. In relation to the appropriateness of an officer giving advice or an opinion during a conciliation conference, the Manual specifies that officers do have a role in providing advice about 'the law and its principles' during the conference but that they must be careful not to give an unsolicited opinion about the merits of a claim or advise on damages.[105]

B. Board Processes as a Reflection of Adversarial Values

It is suggested that this survey of what the Board does by way of investigation and conciliation reflects the Board's construction of itself as providing procedural fairness at all stages in dispute resolution. It is argued below that this leaves 'investigation' and 'conciliation' being similar to aspects of the adversarial ideal. Three particular matters are examined in this respect: the construction of the Board as impartial as between the parties, as a body with a due process approach to investigation and conciliation and as a body whose primary objective is the resolution of the complaint.

Adjudicative impartiality, or neutrality as between the parties, is central to adversarial adjudication and philosophy. As the Australian Law Reform Commission notes, the legitimacy of the process of litigation is largely based on perceptions of judicial impartiality and neutrality.[106] A manifestation of this ideal of impartiality is a view about the importance of the adjudicator remaining detached from the conflict itself. In adversarial theory the reason for the view that judges ought to stay distanced from the conflict and the litigation itself, is the perception that once a judge is actively involved in, for example, gathering

102 Chapman & Mason, above n13 at 531. The case file data sheet provides for five categories under type of discrimination: 'direct only', 'indirect only', 'both direct and indirect', 'other' and 'unknown'. The Manual provides that officers are to fill in as much information as possible on the sheet. See NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at Appendix 7, p49 respectively.

103 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 97.

104 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 10.

105 Ibid.

106 Australian Law Reform Commission, above n16 at 11. McEwan comments that judicial neutrality is the 'cornerstone' of the adversarial system and without it, there appears to be 'little to be said for' the adversarial system: McEwan, above n18 at 15.

evidence or questioning witnesses, he or she may no longer be seen as impartial between the parties and in addition, may inappropriately pre-judge the merits of the case.[107] The construction of the Board as impartial and as detached from the conflict can be seen in the Board's approach to its task of 'investigation'. The Board clearly sees its role as limited in terms of gathering information. It places the primary responsibility on the complainant, and where contacted, the respondent, to formulate arguments and gather information and material relevant to the complaint. It is suggested that were the Board to adopt a more 'active' investigation into the behaviour of the respondent, it would be perceived by respondents as being partisan in favour of complainants. As an institutional matter, the 'investigation' and 'conciliation' of a complaint are usually conducted by the same Board officer. This factor, combined with the view that the Board needs to be seen as impartial between the parties and detached from the conflict itself, may explain why the Board takes a 'hands off' approach to investigation, placing the primary responsibility on the complainant, and where relevant, respondent, to identify and gather the legally relevant factual material. A recent review of the NSW Act by the Law Reform Commission (NSW) has recommended that 'investigation' and 'conciliation' ought to be separated and handled ordinarily by different officers. The rationale is that such a separation would address perceptions of bias.[108] Bryson, drawing on his experience with the Victorian Equal Opportunity Commission, is of the view that where investigation has been 'impartial and fair', having investigation and conciliation handled by the same officer allows trust between the officer and both complainant and respondent to be established and that this benefits the later conciliation.[109] It is suggested that Bryson's view reflects the pressure on the complaint-handling agency to be seen as impartial by both parties in order to maximise the likely success of the conciliation. Given this, an 'impartial and fair' investigation would seem almost inevitably to be one in which the Board stands back and places the onus on the parties to formulate the arguments and provide the material information. A respondent is unlikely to see Board investigation in the form of, for example, appearing at a respondent's premises unannounced, as being impartial and detached.

The Board's construction of itself as impartial can be seen through various other aspects of its complaint-handling processes. Its approach to conciliation conferences when they are held, and its understanding of other forms of conciliation as being the facilitation of an exchange of information between

107 Landsman, *The Adversary System*, above n18 at 3; Landsman, *Readings on Adversarial Justice*, above n18 at 2; Zeidler, above n18 at 395; Ipp, above n18 at 716–717, 719. Justice Ipp has described the principle that judges should not 'take over the conduct of the trial' as one of the 'immutable' characteristic of adversarial process: at 716.

108 The New South Wales Law Reform Commission has identified that the Board 'is perceived to be biased in favour of complainants' as a 'particular concern' of submissions to its inquiry and its own empirical research: Law Reform Commission (NSW), above n31 at para 8.9. The Commission recommends that investigation and conciliation ought to be separated: para 8.93 to 8.96.

109 Bryson, above n42 at 138–139.

complainant and respondent, appear directly linked to ideas of hearing both sides, even-handedness and treating the parties the same. Complainants and respondents are given equal time during conferences in which to articulate their views. Outside conferences the Board forwards each party's statements and documentation to the other party (with some relatively minor exceptions). The Board's views about the inappropriateness of it providing legal advice to a party might also be read as being a concern with providing equal treatment to each party, or not offering one party a level of advice and assistance that is not offered to the other. It might also reflect a concern on the part of the Board to be seen as staying out of the dispute between the complainant and respondent. It would appear that it is complainants who are most likely to request legal advice from the Board, presumably due to their lower levels of legal representation compared to respondents,[110] and perhaps also because complainants appear generally to have more contact with the officer handling their complaint than do respondents. The apparently low level of seeking interim orders, which by their nature are more likely to be of benefit to complainants than respondents, may reflect a concern on the part of the Board to not be seen as having a partisan role on behalf of the complainant. An underrecognition of indirect discrimination might also be interpreted as the Board staying out of the conflict between the parties. Such an underrecognition would also seem to indicate that the primary responsibility is on the parties (in practice the complainant) to define the scope of the complaint in terms of legal arguments raised.

The Board has developed a standard procedure for 'investigation' and 'conciliation'. The Manual contains detailed instructions on the steps involved in these processes. Although these processes are clearly not as rigid as the rules of formal litigation, both share similar objectives. Both systems are primarily directed towards moving the dispute to a particular point (an adversarial hearing or a conciliation conference) through a number of stages in procedure which not only are directed to refining the issues in dispute, but aim to ensure that the hearing or conciliation conference provides both parties with an equal opportunity to put their views and be listened to.[111] In this sense the Board is a due process body.

There is another way in which the Board's approach to its complaint-handling tasks bear similarities with adversarialism. Commentators describe how adversarial proceedings are not seen as necessarily involving a search for the truth. Rather, the objective is to resolve the dispute by due process of law.[112] Justice Ipp however describes a gradual development in this view in Australia towards an understanding that the objective of the adversarial system is to resolve disputes by

110 Above n13 at 550–551.

111 On adversarial procedure being of this nature, see Landsman, *Readings on Adversarial Justice*, above n18 at 4–5.

112 Landsman, *The Adversary System*, above n18 at 1–4; Landsman, *Readings on Adversarial Justice*, above n18 at 3; Jolowicz JA, 'The Woolf Report and the Adversary System' (1996) 15 *Civil Justice Quarterly* 198 at 200–201; McEwan, above n18 at 6–8. Zeidler contrasts a search for truth as a characteristic of the civil law tradition: Zeidler, above n18 at 392.

discovering the 'truth' of what occurred.[113] In some case files examined in the Chapman & Mason study, the 'truth' of what took place, in the sense of the 'facts', was not itself in dispute. What was in dispute was either the interpretation of the 'facts' or alternatively, whether the respondent was justified in behaving the way it did. In those cases however where the 'facts' were themselves in dispute, if the Board's pre-eminent concern was with getting at the 'truth' of what occurred, it would be expected to be more actively involved in investigating the complainant's allegations, more prepared to raise and investigate potential indirect discrimination and would presumably take a more 'hands on' approach in conciliation itself. That it doesn't suggests that Board processes are not necessarily directed to establishing the 'truth' of what occurred. Rather, conciliation of a dispute constructed by the parties, leading to a settlement, appears to be the primary objective of the jurisdiction.

A fundamental tension may underlie the Board's complaint-handling function. The Board describes the role of the complaint handler as being 'an advocate for the legislation.'[114] Although neither the Manual, nor the Board, articulate what this means, it would seem to be similar to the idea discussed by Astor & Chinkin, and by Bryson (drawing on his experience as a conciliator in the Victorian Equal Opportunity Commission), that the conciliator is a 'guardian' of the principles of the legislation.[115] Bryson writes as follows: 'The conciliator ... is accountable to the law under which he or she conciliates. The conciliator is an advocate for the law while remaining impartial to the parties.'[116] These commentators appear to mean that conciliators are charged with the task of ensuring that the relevant statute is complied with. But it is not entirely clear what this means. What is required in order to comply with the legislation? As Thornton points out the legislation provides only procedural rights — a right to have a complaint of discrimination (or vilification) dealt with through processes of investigation and conciliation. No statute provides a substantive right not to be discriminated against or vilified.[117] Being an 'advocate for the legislation' might mean then only that a process of investigation and conciliation is provided, it does not necessarily mean that the outcomes from the process ensure, for example, non-discrimination by that respondent in the future and/or appropriate compensation to the complainant in recognition of the infringement of a substantive right. In practice being a guardian for the principles of the legislation does not appear to mean the latter interpretations. If it did, then this would seem to require the Board being involved in a task of discovering the 'truth' of what actually occurred by, for example, conducting a full investigation into the behaviour described by the complainant, and having an interest in the framing of the issues, the content of conciliation plus any settlement reached. This is clearly not the Board's approach. Rather, the former interpretation would seem to more accurately reflect the Board's approach.

113 Ipp, above n18 at 712–716.

114 NSW Anti-Discrimination Board Complaints Resolution Branch, above n47 at 97.

115 Astor & Chinkin use the word 'guardian': above n3 at 271.

116 Bryson, above n42 at 137.

117 Thornton, above n8 at 33–43, especially 39.

It is suggested that the pre-eminence of procedural fairness in the Board's construction of its role is an important factor in shaping this interpretation. The Board's view of itself as even-handed with the parties, and in particular as staying out of the conflict between them, would seem to require an interpretation of being an advocate for the legislation as about providing a process of conciliation, rather than any wider meaning of the phrase.

In these different ways it is suggested that what the Board does by way of 'investigation' and 'conciliation' reveals characteristics of adversarial method and philosophy. In particular the Board is constructed as impartial between the parties and distant to the conflict between them. The Board appears to see its main function as being one to provide a set of flexible but standard procedures leading to a settlement, leaving it to the parties to shape the issues, form the arguments and gather relevant material. It is to the role of the parties that this article now turns.

6. *A Focus on the Parties in the Processes of Investigation and Conciliation*

The discussion above provides a focus on the Board, what it does by way of 'investigation' and 'conciliation', and how this bears similarity to adversarial themes. This section of the article focuses on the parties, and explores how the Board's construction of its role is premised on a particular view of the parties and their role in moving the complaint to a settlement.

A. The Board's Processes and the Parties

In adversarial hearings the adjudicator determines the dispute as constructed by the parties. It is the parties who have primary carriage of the case. Parties, and not the adjudicator, decide whether to bring or defend a claim, what arguments to raise and how to frame them, what evidence to produce, which witnesses to call and what to ask them, whether to settle, and if so, on what terms. The parties are the driving force of formal legal proceedings, with the adjudicator limited to the issues raised before him or her.[118] This approach assists adjudicators to maintain their position of impartiality and detachment. It also assists them to not prejudge the merits of the claim. In Zeidler's train analogy discussed above, it is the parties who are the drivers and signallers of the train, the judge is present to ensure merely that the train does make the few compulsory stops.[119]

In the NSW discrimination jurisdiction, the parties too appear to be the drivers and signallers of the complaint. There are few compulsory stops in the NSW jurisdiction. Apart from the legislative requirement that the complainant's allegations constitute a complaint within the meaning of the Act, and perhaps a few other matters such as attendance at a compulsory conference, the parties have relatively wide discretion to 'set the points' in the passage of the complaint. As

118 Andrews, above n18 at 34, 37–45; Australian Law Reform Commission, above n16 at 18; McEwan, above n18 at 4; Landsman, *Readings on Adversarial Justice*, above n18 at 3.

119 Zeidler, above n18 at 391–392.

discussed above they have the responsibility for, among other matters, framing the arguments, gathering material information and deciding whether to settle. The apparent under-recognition of claims of indirect discrimination suggests that conciliation will be limited to what the parties raise. The parties alone decide whether and when to settle the complaint and the Board appears to have no direct interest in the content of settlement agreements reached. Such centrality of party participation is a strong marker of the adversarial ideal.

O'Malley writes that '[a]t least in principle, adversary procedure is structured as a competitive struggle between two formally equal parties'.[120] The same point has been made by Damaska who wrote about two sides in a position of 'theoretical equality before a court'.[121] The assumption of the adversarial model is that individuals are sufficiently knowledgeable and resourced to take part equally in the struggle that is litigation. The idea is that with the 'competition' being between equals, the party with the strongest argument will prevail. Substantive differences between parties in terms of, for example, financial resources, ability to engage legal representation and understanding of the jurisdiction are ignored in adversarial philosophy.[122] Apart from the Board's ability to provide an interpreter (to either the complainant or the respondent), there is no formal recognition in the Board's practices that explicitly and directly address differences in knowledge, resources and negotiating skills between complainants and respondents. As such substantive differences between complainants and respondents are not explicitly addressed in Board processes, 'investigation' and 'conciliation' are implicitly constructed on a dispute between two formally equal parties.

It is acknowledged that treating parties the same, when there are considerable differences between them in terms of negotiating power and ability to access resources and information, provides space for those differentials to be played out.[123] As Gaudron J has written, 'more recent legal analysis accepts that, where difference exists, identical treatment compounds underlying inequality and produces further injustice'.[124] So in treating complainants and respondents the same, the procedures of the NSW Board create a space in which parties with superior bargaining power and access to resources are able to use that power in the negotiation processes. In this way, complaint-handling procedures do not deliver practices that are, in reality, neutral as between parties. Rather, they favour parties with greater resources and bargaining power, typically respondents.

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120 Pat O'Malley, *Law, Capitalism and Democracy: A Sociology of Australian Legal Order* (1983) at 122.

121 Damaska, above n18 at 511.

122 See further, Judith Resnik, 'Failing Faith: Adjudicatory Procedure in Decline' (1986) 53 *U Chi LR* 494 at 513.

123 Thornton, above n8 at 175; NADRAC, above n7 at 30; Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Soc'y Rev* 95.

124 Mary Gaudron, 'Equality Before the Law with Particular Reference to Aborigines' (1993) 1 *TJR* 81 quoted in NADRAC, above n7 at 32.

B. Complainants and Respondents as Unequal Participants

It is clear from the Chapman & Mason research that in several cases, complainants, and sometimes respondents, were simply not able to participate in the dispute resolution system in the way anticipated by Board procedures, that is, as formally equal disputants. Complainants appeared generally to be in a much weaker structural position relative to the (identified or identifiable) respondents. Such a power dynamic is usual in discrimination complaints. Astor & Chinkin note that '[d]iscrimination cases ... almost always involve respondents who are more powerful than the complainants by virtue of status and access to financial and other resources'.[125] Thornton is less ambivalent. She describes an 'inherent inequality between the parties' to discrimination complaints.[126]

Asymmetrical bargaining positions of complainants and respondents in the Chapman & Mason study reflected several matters. All complainants were individuals, most acting either on their own or with the support of a family member or work colleague.[127] Less than one-third of the complainants in the study received advice or support from another source (namely a solicitor, a trade union or community organisation).[128] In only 12 per cent of the cases (six cases) did it appear from the case file material that the complainant was in receipt of advice or representation from a solicitor (at any stage in the dispute resolution process).[129] This figure is similar to findings on the level of complainant legal representation in sex discrimination and racial vilification complaints.[130] Trade unions provided support and assistance to complainants in three cases and gay and lesbian organisations

125 Above n3 at 262.

126 Thornton, above n8 at 175. Other literature recognises power imbalances in the conciliation of discrimination complaints and in ADR processes more generally. See, for example, Kathy Mack, 'Alternative Dispute Resolution and Access to Justice for Women' (1995) 17 *Adel LR* 123 (which examines conciliation in discrimination law and mediation in family law); Devereux, above n7 at 283–284; HREOC, above n100 at 19; NADRAC, above n7 at 47–188 (on the impact of gender, culture, race, age, disability, sexual preference, geographic location and economic differences on ADR processes).

127 Above n13 at 539–540. In their study of sex discrimination complaints, Hunter & Leonard found that approximately 91 per cent of complaints were brought by individuals acting alone: Hunter & Leonard, above n48 at 2. In his study of racial vilification complaints under the *ADA* (NSW), McNamara uncovered that almost three-quarters of complaints were brought by individuals: McNamara, above n94 at 355.

128 Above n13 at 550.

129 Id at 551.

130 Hunter & Leonard found that 17.1 per cent of complainants in their study of sex discrimination complaints received legal advice at some stage in the dispute resolution processes: Hunter & Leonard, above n48 at 4. McNamara calculated that just under 10 per cent of complainants in his study of racial vilification cases in NSW had legal representation: McNamara, above n94 at 361. On the importance of legal representation for women in ADR, see Mack, above n126 at 140–142.

in four complaints.[131] Respondents were more likely to be in receipt of external advice, including legal advice, than were complainants.[132]

A number of commentators have identified an underlying assumption in the adversarial system to the effect that both parties have (equally competent) legal representation so that the 'contest' between them is a fair one.[133] Lord Devlin has expressed the view that in the absence of legal representation, the adversary system 'breaks down' in practice because the judge will be left to assist the unrepresented party.[134] Such a situation would eventually threaten the judge's appearance of impartiality.[135] Although it is clear that there is no common law right in Australia to publicly funded legal representation, the desirability of having counsel present in the adversarial process is recognised by the High Court.[136] Many parties to the complaints in the Chapman & Mason study were unrepresented by legal or other suitably qualified representatives. Notably, more complainants than respondents were unrepresented. This puts complainants at a disadvantage relative to respondents. The lack of suitable legal or other advice to complainants is particularly troubling as the Board's approach to its dispute resolution functions places, in effect, the primary responsibility on the complainant to formulate and identify the arguments on which he or she relies, and to identify and gather relevant information. Effectively this means that the parties, and complainants more than respondents, are missing out on one of the (admittedly imperfect) safeguards of the adversarial system, in a system of complaint-handling that contains traces of adversarial method and philosophy.

Whilst complainants were all individuals, respondents, where they were identified or were identifiable from the case file material, were largely collectivities, although constructed in the dispute resolution procedures as individuals. They were mostly public and private business organisations and institutions.[137] Although it was not possible to accurately gauge from the case file material the size of the businesses, it is estimated that only about one-quarter of them appeared to be small in the sense of employing five or less employees. In the

131 A lack of trade union presence in support of complainants has been noted by other researchers. See Thornton, above n8 at 155; Hunter & Leonard, above n48 at 5; Louise Thornthwaite, 'A Half-Hearted Courtship: Unions, Female Members and Discrimination Complaints' (1992) 34 *JIR* 509.

132 In nine cases (45 per cent of respondents who were contacted) respondents were in receipt of legal or other advice from an external source. In seven cases this was legal advice: above n13 at 551. While complainant solicitors generally revealed a good understanding of the processes in the jurisdiction and contributed positively to the resolution of the complaint, some respondent solicitors were 'adversarial and obstructionist' in their approach to the Board's processes: above n13 at 552. Hunter & Leonard also found in their study of sex discrimination that respondents were more likely to be in receipt of legal advice than complainants: Hunter & Leonard, above n48 at 8. In contrast, in her study of conciliation conducted by HREOC, Devereux found that complainants were considerably more likely to have legal representation than were respondents: Devereux, above n7 at 291.

133 Andrews, above n18 at 34 who describes the assumption that the lawyers representing the parties will be 'efficient and equally matched'; Patrick Devlin, *The Judge* (1979) at 67; Resnik, above n122 at 513.

134 Devlin, above n133 at 67.

135 Andrews, above n18 at 34.

136 See *Dietrich v R* (1992) 177 CLR 292 in which the High Court noted that courts have power to stay proceedings in criminal trials that will result in an unfair trial should they continue.

Chapman & Mason study, respondents, where contacted, tended to be represented in the Board's processes by managers and, in one case, the respondent's in-house legal team. In a dispute between an individual (complainant) and a public or private business organisation or institution, the business is likely to be advantaged due to its greater economic strength.[138] In addition to such a resource differential, respondents were generally represented in the Board's complaint-handling procedures by professional managers who presumably have expertise in dealing with conflicts with employees. This would be expected to give an advantage to respondents over complainants.

Another factor favoured some respondents. Five respondents were 'repeat respondents' in the sense of being 'regularly involved in the complaint process'.[139] The advantages that such respondents have would be expected to be substantial. They have experience in the jurisdiction and so have the benefit of advance knowledge and understanding of Board processes and legal rules. They are better positioned than complainants to be able to formulate, articulate and successfully carry out a negotiating strategy.[140] In addition, 14 per cent of cases (seven cases) in the Chapman & Mason study involved respondents who were, or were linked to, Christian organisations. The legitimacy of Christian institutions and beliefs continue to hold great sway in Australia (as elsewhere), as evidenced in the provisions in various discrimination statutes which exempt, in certain circumstances, the conduct of religious institutions and behaviour based on religious beliefs.[141] It is suggested that such a presumption of legitimacy may impact on investigation and conciliation processes. For example, a lack of preparedness by a religious respondent to genuinely examine its practices and behaviour may reflect a presumption of ethical behaviour on its own part. Such unpreparedness may require a complainant to be especially resilient in pursuing his or her complaint.[142] These matters are likely to weigh in favour of the respondent.

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137 The manager of the Complaints Resolution Branch has said that in relation to employment complaints, it is the Board's practice to list the respondent as the employer alone: Interview with the Manager, Complaints Resolution Branch, Anti-Discrimination Board, 22 August 1997. Astor & Chinkin note that respondents in discrimination cases are commonly the proprietors of business: above n3 at 262. In contrast, in the Hunter & Leonard study, almost 20 per cent of respondents were individuals: Hunter & Leonard, above n48 at 5. In the Chapman & Mason study, only 2 complaints involved respondents (identified and identifiable) who were individuals. Both these complaints involved vilification: above n13 at 541–544.

138 NADRAC, above n7 at 171–172; Mack, above n126 at 126–128 (discussing economic and information differentials).

139 Sex Discrimination Commissioner (HREOC), *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Sexual Harassment in the Australian Defence Force* (1993) at para 6.2 cited in Hunter & Leonard, above n48 at 5. On procedural proposals and repeat respondents in the NSW jurisdiction, see New South Wales Law Reform Commission, above n31 at paras 8.152 to 8.156.

140 Galanter developed a framework of 'repeat players' and 'one-shotters' to explore the advantages that 'repeat players' have over 'one-shotters' in United States legal process: Galanter, above n123. On the use of such concepts in the Australian discrimination law context, see Thornton, above n8 at 175–176; NADRAC, above n7 at 176; New South Wales Anti-Discrimination Board, above n35 at 177.

141 For example, *ADA* (NSW) s56.

142 An example of such dynamics would seem to be provided in the case of *Griffin v The Catholic Education Office* (1998) EOC 92-928.

Approximately half the complaints in the study involved (paid) work relationships.[143] An employee/employer relationship is paradigmatically one of inequality.[144] Such structural inequality favouring respondents was exacerbated by the fact that only four complainants (17.4 per cent of complainants in the employment cases) came within the professional categorisation of the Australian Standard Classification of Occupations.[145] The remainder were in occupations typically characterised by vulnerability in labour markets. They were, for example, receptionists, secretaries, general office clerks, animal attendants, kitchen hands and waiting staff. Only one complainant in the 23 employment cases was still employed in the workplace in which the unlawful conduct was said to have occurred. This factor may impact on the power dynamics between the parties in a number of different ways. A worker may be more prepared to challenge the practices of a former employer than a current employer as he or she is no longer dependent on that respondent for ongoing work. Alternatively, the complainant's status as a former, rather than current employee, might mean that in his or her efforts to secure a new job, he or she is susceptible to negative assessments of his or her work by the former employer, through for example, job references. The case file material did not enable a direct assessment of how the status of being a former employee shaped the power dynamics between the parties to employment complaints. Reading the files did, however, leave the impression that complainants who were former employees of the respondent were generally concerned about the impact of the complaint on what their former employer might say about them.[146] It is suggested that job references may be very important in the non-professional occupations that complainants in the Chapman & Mason study pursued. In this sense complainants may have been in a weaker bargaining position than respondents.

A range of additional factors shape power dynamics between complainants and respondents in discrimination jurisdicitions. Complainants generally come from groups that have been marginalised in the Anglo-Australian civil and political system.[147] For example, the complaints examined in the Chapman & Mason study were all lodged by women under homosexuality provisions. Lesbians have not been well served by the formal court system, the government, or private institutions.[148] In addition, a related aspect in this group of complaints is that complainants under sexual preference grounds are, in effect, required to reveal (and be prepared to discuss) their sexual preference in order to lodge a complaint and pursue it. Whilst conciliation is confidential, should the complaint not be resolved at that stage, the

143 Above n13 at 531.

144 Paul Davies & Mark Freedland (eds), *Kahn-Freund's Labour and the Law* (3rd ed, 1983) at 18; Hugh Collins, 'Labour Law as a Vocation' (1989) 105 *LQR* 468; Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (3rd ed, 2000) at 4–5.

145 Above n13 at 540–541. In contrast, Hunter & Leonard found in their study of sex discrimination complaints that the occupations of complainants exhibited 'a striking tendency towards the white collar and professional end of the scale': Hunter & Leonard, above n48 at 3.

146 Although Australian discrimination statutes, including the *ADA* (NSW) s50, contain provisions that prohibit a respondent from victimising a complainant, the fear of victimisation in the mind of the complainant may be strong: above n3 at 262.

147 Above n3 at 262; Thornton, above n8 at 153.

next step for the complainant is a public hearing before a tribunal.[149] Moreover, there does not appear to be effective enforcement procedures in relation to the confidentiality requirement. Pursuing a complaint under a sexual preference ground may, for these reasons, be extremely stressful for a complainant who may be wary of state institutions, and who may not wish to identify and discuss her sexual preference in a public forum or even conciliation.[150] In this sense, complainants may see themselves as having more to lose than respondents and may for this reason not take part in the complaint-handling processes as an equal party.

A related aspect of the complaints in the Chapman & Mason study appears relevant to the power dynamics between the parties. Sixty per cent of the discrimination cases in the study involved the presence of a lesbian relationship.[151] Almost half these complaints related to the ways in which respondent policies and practices impacted on a same-sex couple rather than the individual women themselves.[152] The legal rules in relation to complaints alleging less favourable treatment of a same-sex couple are not as clear as they might be. The *ADA* (NSW), along with discrimination legislation in other jurisdictions, does not explicitly cover same-sex relationships. Although in 1995 a decision of the Tribunal interpreted the NSW statute as applying to same-sex relationships,[153] decisions of the Tribunal are not technically binding on future Tribunals, and for this reason the legal rules in this area are far from settled. This uncertain coverage of same-sex couple relationships is exacerbated by the fact that so few complaints under sexual preference grounds proceed to a tribunal (or court) hearing. This lack of clarity and predictability in the legal rules in relation to the less favourable treatment of same-sex relationships is a factor which is likely to shape the power dynamics between complainants and respondents because clear legal rules prohibiting the conduct complained of bolster a complainant's negotiating position. Ambiguity in legal entitlements favours respondents.[154]

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148 In the Australian context, see generally Senate Legal and Constitutional References Committee, *Inquiry into Sexuality Discrimination* (1997) especially paras 2.1 to 2.114; Hilary Astor, 'Mediation of Intra-Lesbian Disputes' (1996) 20 *MULR* 953 at 957–962; Jenni Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' (1998) 12 *AJFL* 99. For work in the United States context, see Ruthann Robson, *Lesbian (Out)Law: Survival Under the Rule of Law* (1992). On the impact of gender and sexual preference on ADR processes, see NADRAC, above n7 at 33–43, 140–152.

149 Although provisions exist for confidentiality to be maintained at the Tribunal level, such an order is exceptional: *ADA* (NSW) s110A. Tribunal hearings frequently attract media attention, especially those involving questions of harassment.

150 Above n3 at 263; NADRAC, above n7 at 144; New South Wales Anti-Discrimination Board, above n35 at 177. Of course a respondent may also anticipate adverse consequences to it should the complaint go to a public hearing and this may provide a powerful incentive for the respondent to reach an agreement with the complainant: Thornton, above n8 at 154.

151 Above n13 at 532.

152 Id at 533.

153 *Hope v NIB Health Funds Ltd* (1995) EOC 92-716. An appeal against this decision was not successful: *NIB Health Funds Ltd v Hope* (NSW Supreme Court, Administrative Law Division, McInerney J, 15 November 1996). Contrast *Wilson and Halloran v Qantas Airways Ltd* (1985) EOC 92-141.

154 On the influence of uncertain legal entitlements in shaping the power dynamics between parties, see NADRAC, above n7 at 58; Mack, above n126 at 128–129.

This section of the article has sought to show first, how Board practices are predicated on a view of complainant and respondent as formally equal and secondly, how this premise results in the unequal impact of Board practices on complainants and respondents.

7. *Conclusions*

A number of calls have been made for more research, and in particular evaluative work, on ADR in Australia.[155] As Astor & Chinkin point out, we have tended in Australia to adopt informal dispute resolution enthusiastically and somewhat uncritically.[156] This article's socio-legal examination of the internal (confidential) processes of the NSW jurisdiction builds on earlier work on complaint handling in discrimination jurisdictions. Its potential is to inform policy development and law reform debates about the appropriate form of discrimination law.

The statutory rules in the NSW Act provide the Board with relatively wide discretion to undertake the 'investigation' and 'conciliation' of complaints. The objective of this article is to reveal how these supposedly informal processes contain traces of an adversarial ideal. The article shows, in effect, that ADR and adjudication are not dichotomous. Investigation and conciliation in NSW contain traces of adversarial methodology and philosophy about the role of the state, the importance of the parties, and the centrality of same treatment and due process in moving a dispute to an outcome.

Differential power characterises the relationship between complainants and respondents in discrimination complaints. Such was apparent in the complaints in the Chapman & Mason study. Indeed the enactment of anti-discrimination legislation contains an implicit recognition that not all people are, in fact, equal. The inappropriateness of an adversarial approach to dispute handling in such circumstances is clear. Resnik, writing in the United States context, describes the failings of the adversarial approach as follows:

> Adversarialism is a plausible mechanism for generating information leading to acceptable outcomes and for validating individual dignity only where the adversaries are roughly comparable — when each side has similar resources. But, as is well known, many who attempt strategic adversarial interaction have few resources, little information, and disloyal, indifferent, or nonexistent agents.[157]

The importation of adversarial values into discrimination jurisdictions, marked as they are by significant power inequalities, can only be seen as a regressive development.

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155 Government initiatives have been part of the emerging debate in Australia about the merits and limitations of ADR: NADRAC, above n7; Access to Justice Advisory Committee, above n7. See also Australian Law Reform Commission, above n18 at paras 6.52 to 6.66.

156 Above n3 at 1–12.

157 Resnik, above n122 cited in Thornton, above n8 at 175.