

PLANNED LITIGATION: SHOULD IT PLAY A GREATER ROLE IN HUMAN RIGHTS LITIGATION IN AUSTRALIA?

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Planned litigation is a form of litigation used by human rights organisations around the world. However, the full scope of this method is not widely known in Australia. This article outlines the full scope of what is known overseas as planned litigation. It also undertakes a preliminary review of litigation in the High Court by Australian human rights organisations and finds both that there are some indications of a lack of success in such litigation and that there is little evidence of the use of planned litigation. It then argues that its outline of the details of planned litigation along with such preliminary data forms a basis to begin a discussion in Australia about whether Australian human rights organisations should experiment with greater elements of planned litigation. Finally, it outlines ways in which planned litigation might improve the effectiveness of High Court litigation by Australian human rights organisations and factors that might affect the viability of such a use of planned litigation.

I INTRODUCTION

There are some preliminary indications that litigation by Australian human rights organisations in the High Court has not been very successful. There could be many reasons external to such human rights organisations why this might be the case. Among them might be the lack of human rights protections in the *Australian Constitution* or a national human rights act,¹ a weak human rights culture in civil society, or a judiciary sometimes concerned with being accused of being ‘activist’.

In addition to these external barriers, however, there are also barriers internal to the way that Australian human rights organisations have operated that may

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1 However, the author notes that planned litigation was used with some success in South Africa in the apartheid era where a lack of human rights protections also existed: Richard L Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994* (Routledge, 1995) 61–2.

have contributed to what appears to be a relative lack of success. This article will focus on how these organisations litigate as such a barrier.

It argues that enough preliminary information points in the direction of a lack of success by Australian human rights organisations in their litigation in the High Court that, when considered in conjunction with an outline of the full scope of planned litigation, it justifies a consideration of the adoption of elements of planned litigation by Australian human rights organisations. It also argues that both internal and external barriers to the success of Australian human rights litigation in the High Court could be ameliorated to some extent if such organisations adopted elements of planned (or impact) litigation as it is practiced by human rights litigators overseas.

II MEASURES OF EFFECTIVENESS

In a previous work the author focused on the internal barriers to effectiveness of domestic human rights organisations' use of the law in several countries around the world (not including Australia) using a global and more sophisticated approach than used in this article to assess effectiveness.²

This article is concerned with the much more limited question of what that previous work considered only briefly as a method for carrying out litigation.³ Indeed, it is even more limited than the previous work in that it focuses only on litigation by Australian domestic human rights organisations in the High Court.

In any jurisdiction, in a situation where the highest court is resistant to human rights litigation, it is sometimes rational for human rights litigators to concentrate on other courts. While it might be possible to perceive some resistance in the High Court to human rights litigation, it still remains the forum where the greatest impact through litigation can be achieved.⁴ Recent decisions by the Court also appear to indicate that some room for success there exists.⁵ As a result, the author believes that a focus on the High Court is of importance.

The methodology used in this article to gain some preliminary data on the effectiveness of litigation by Australian human rights organisations in the High Court was simply to search cases on the Australasian Legal Information Institute ('AustLII') database for reference to Australian human rights organisations. The organisations that appeared in this search, namely the Human Rights Law Centre ('HRLC'), the Public Interest Advocacy Centre ('PIAC'), and Amnesty International Australia, are the organisations that this article is referring to when

2 Scott Calnan, *The Effectiveness of Domestic Human Rights NGOs: A Comparative Study* (Martinus Nijhoff, 2008) ch 5.

3 Ibid 37–44.

4 The author is aware that the National Justice Project has focused on the Federal Court (see, eg, *DCQ18 v Minister for Home Affairs* [2018] FCA 918) and the HRLC has recently had some focus on the Supreme Court of Victoria (see, eg, *Certain Children v Minister for Families and Children* [No 2] (2017) 52 VR 441).

5 See, eg, *Brown v Tasmania* (2017) 261 CLR 328.

it refers to Australian human rights organisations.⁶ The cases located in this search, along with any others that the author is aware of (but do not show as such in the reports), is the information that the author refers to as preliminary information about effectiveness.

Using this methodology, the author's statement that there are some preliminary indications that suggest that litigation by Australian human rights organisations in the High Court has not been very successful is based upon the very simple measure that there are only two cases that the author knows of or can locate using the above methodology in which such organisations have had decisions in their favour in the High Court.⁷

Such a simple measure could be criticised for not taking account of more nuanced criteria such as the reasoning of decisions. It could also be criticised for not taking into account the educative effects of losses in the High Court.⁸ However, in the author's view, and at the very least, it forms, along with the other information in this article, a basis that justifies a consideration of planned litigation as an approach that might add to or enhance the effectiveness of litigation by Australian human rights organisations in the High Court.

III PLANNED LITIGATION

Planned litigation goes by many different labels. Sometimes it is referred to as impact litigation, strategic litigation, test case litigation, social action litigation, social change litigation, and sometimes as a form of public interest litigation.⁹ This plethora of names, as well as the isolation of Australia from other countries where it is widely practised, creates a fertile field for confusion about what is meant by planned litigation.

While some Australian legal centres that periodically involve themselves in human rights litigation in the lower courts appear to show some knowledge of the elements of planned litigation,¹⁰ in the author's experience, there is a general lack

6 Other organisations such as the National Justice Project are accordingly not considered because they do not appear in the author's search and the author is unaware whether they have otherwise litigated in the High Court.

7 The first being *Roach v Electoral Commissioner* (2007) 233 CLR 162, which was confirmed to be a HRLC case: Human Rights Law Centre, *Prisoners and the Right to Vote: Roach v AEC and Commonwealth of Australia* (23 August 2007) <<http://www.hrlc.org.au/news/roach-decision-prisoners-right-to-vote>>. The second case was *Rowe v Electoral Commissioner* (2010) 243 CLR 1, confirmed to be a case HRLC jointly coordinated: Federation of Community Legal Centres (Vic), 'Strategic Litigation' (The Change Tool Kit, ch 8, 2015) <<http://www.thechangetoolkit.org.au/wp-content/uploads/2015/01/Chapter-8-Strategic-litigation.pdf>>.

8 In that regard, see Philip Lynch, 'Harmonising International Human Rights Law and Domestic Law and Policy: The Establishment and Role of the Human Rights Law Resources Centre' (2006) 19 *Melbourne Journal of International Law* 225.

9 James A Goldston, 'Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges' (2006) 28 *Human Rights Quarterly* 492, 496.

10 For example, the Federation of Community Legal Centres (and especially the Flemington and Kensington Community Legal Centre) in Victoria: Federation of Community Legal Centres (Vic),

of knowledge about the full scope of planned litigation amongst Australian litigators. Accordingly, it would appear that there is a benefit in setting out, in greater detail than the author has in the past,¹¹ what is meant by planned litigation.

Planned litigation originated in the United States of America ('US') during the efforts from the 1920s by the National Association for the Advancement of Colored People ('NAACP'),¹² an African American civil rights organisation, to challenge the constitutionality of racial segregation in the US Supreme Court. The classic employment of this approach to litigation was in the victory by the NAACP Legal Department (by then known as 'LDF') in the US Supreme Court in the *Brown v Board of Education* case which declared racial segregation in the US to be unconstitutional.¹³

The victory in the *Brown* case made 'the Brown model' of litigation the subject of replication by all manner of civil rights and other progressive organisations in the US in the 1960s, 1970s and 1980s.¹⁴ As the approach spread, it developed a large number of variations and modifications. Eventually, it was adopted internationally to be employed by human rights organisations such as the Roma Rights Centre in Central Europe (where interestingly it was also applied to litigation in international human rights courts and bodies),¹⁵ Interights in the UK,¹⁶ and the Legal Resources Centre in South Africa.¹⁷

Planned litigation is an approach to litigation using test cases that emphasises control.¹⁸ It is 'litigation designed to reach beyond the immediate case and individual client' to address the collective and structural causes of human rights violations.¹⁹ Typically, a human rights organisation employing such an approach first identifies a social issue involving a human rights violation that urgently needs to be addressed and that can be framed as a legal issue in the target court or

'Strategic Litigation' (The Change Tool Kit, ch 8, 2015) <<http://www.thechangetoolkit.org.au/wp-content/uploads/2015/01/Chapter-8-Strategic-litigation.pdf>>.

11 See Calnan, above n 2, 41.

12 See Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (University of Pennsylvania Press, 1983).

13 347 US 483 (1954) ('*Brown*'). See Richard Kluger, *Simple Justice: The History of Brown v Board of Education and Black America's Struggle for Equality* (Vintage Books, 2004).

14 See, eg, Roger Alan Stone, 'The Mass Plaintiff: Public Interest Law, Direct Mail Fundraising and the Donor/Client' (1992) 25 *Columbia Journal of Law and Social Problems* 197, 204.

15 See, eg, James A Goldston, 'Ending Racial Segregation in Schools: The Promise of *DH*' (2008) 1 *Roma Rights Journal* 1, 3.

16 Andrea Coomber, 'Strategically Litigating Equality – Reflections on a Changing Jurisprudence' (2012) 15 *European Anti-Discrimination Law Review* 11; European Roma Rights Centre, Interights and Migration Policy Group, 'Strategic Litigation of Race Discrimination in Europe: From Principles to Practice' (Manual, 2004).

17 Richard J Wilson and Jennifer Rasmussen, *Promoting Justice: A Practical Guide to Strategic Human Rights Lawyering* (International Human Rights Law Group, 2001) 60.

18 Calnan, above n 2, 41.

19 Goldston, 'Public Interest Litigation in Central and Eastern Europe', above n 9, 496, misquoting Zdravka Kalaydjieva et al, 'Strategic Litigation: Bringing Lawsuits in the Public Interest' in Edwin Rekosh, Kyra A Buchko and Vessela Terzieva (eds), *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists* (Public Interest Law Initiative, Columbia Law School, 2001) 81, 81.

body.²⁰ In a membership body such as the NAACP, such issues classically came from the bottom up from members experiencing the problem themselves.²¹ In organisations that had no members, the issue might be identified much more indirectly by staff.²²

The organisation then typically creates a litigation plan or blueprint that outlines how cases will be used to wear down old precedent and replace it, or to create new precedent.²³ Much debate has erupted in the literature about how closely organisations follow such plans. Authors such as Kluger have emphasised the planned and programmatic nature of such litigation,²⁴ while others such as Wasby have emphasised the ad hoc nature of such litigation and questioned whether it is actually planned.²⁵ It would appear that overall such plans are not slavishly or mechanically adhered to. However, they do provide overall goals and broad methods that inform the litigation programme as it adapts to factors such as internal organisational changes, changes in funding, and changes in the political and legal environment.

Classically, once the issue has been identified a human rights organisation would then seek out cases with fact patterns that would manifest the relevant issue most clearly and would draw the most favourable or sympathetic response from the target court or body.²⁶ Such ‘case finding’ might occur within the membership of the organisation itself or other bodies it knows, it might come from lawyers that cooperate with it, or it might occur through contacts in the communities suffering the human rights violation.²⁷

It may not be apparent to the human rights organisation which of the cases that it initially thinks might contain the most favourable facts and law will actually still contain such a pattern once they reach the relevant court.²⁸ Such a court may be at the apex of a judicial hierarchy and many unpredictable events may occur before the case reaches that court.²⁹ Such events may change how favourably the case may present to the court. As a result, a human rights organisation using this technique often selects several cases presenting the same issue and runs them all simultaneously.³⁰ This opens up the possibility of discontinuing the case or cases that end up not presenting the issue well before they create bad precedent in the target court. Conversely, if all of the cases

20 Kalaydjieva et al, above n 19, 86.

21 See, eg, Mark V Tushnet, *The NAACP's Legal Strategy against Segregated Education 1925–1950* (University of North Carolina Press, 1987) 147–8.

22 Calnan, above n 2, 48.

23 European Roma Rights Centre, Interights and Migration Policy Group, above n 16, 46.

24 Kluger, above n 13.

25 S L Wasby, *Race Relations Litigation in an Age of Complexity* (University of Virginia Press, 1995) x.

26 Wilson and Rasmussen, above n 17, 42.

27 Stephen L Wasby, ‘How Planned is “Planned Litigation”?’ (1984) 83 *American Bar Foundation Research Journal* 83, 121, 126.

28 Wasby, *Race Relations Litigation in an Age of Complexity*, above n 25, 196.

29 *Ibid* 236.

30 *Ibid* 159.

present the desired issue well they can be joined and considered by the target court jointly (as was done in *Brown*).

The aim in planned litigation is to present to the target court or body the most favourable cases in the most favourable sequence at the most favourable time such that they will result in a favourable ruling.³¹ Such sequence and timing can be crucial where the aim is to erode adverse precedent.³²

In order to achieve this aim, the organisation involved will try to ensure that other cases that it is not running or controlling that raise the relevant issue do not reach the target court. It cannot, of course, stop other human rights organisations or individuals bringing such cases. Rather, if there is more than one organisation litigating a particular issue the aim is generally to negotiate so that all of the organisations (or individuals) litigating that issue approach it in an agreed and planned way. If there are multiple litigators and an agreement cannot be achieved, planned litigation will not have adverse consequences for cases run by other individuals or human rights organisations on the issue; rather, planned litigation will likely not be able to be carried out at all (or only partially) and other approaches to litigation might have to be considered.

In short, planned litigation tries to ‘simplify’ the litigation environment as much as possible so that adverse or complicating precedent is not created by other cases that the organisation or organisations do not control reaching judgment in the target court. Achieving this type of control has become increasingly difficult in the US as litigators and organisations have multiplied.³³

Those organisations involved in planned litigation not only want to control the possible creation of adverse precedent through cases addressing the exact issue targeted. They also want to prevent the creation of adverse precedent if they can in cases on other issues that may contain doctrinal developments that will adversely influence cases on the issue or issues they are focusing on.

Some organisations that practice planned litigation do not favour amicus briefs because such an approach means they cannot retain sufficient control over litigation.³⁴ However, amicus briefs may be used to signal to a court that an organisation has presence in it whenever a particular targeted human rights issue is raised.³⁵ Part of the purpose of a litigation programme in planned litigation is to ‘socialise’ the court: to get the court used to and accepting of both the presence of the organisation and its issue in the court through repeated appearance before the court. As is often said in the literature, repeat players in court litigation can gain advantages that lead to favourable results.³⁶ Planned litigation seeks to gain that advantage through repeated presence and the cultivation of a favourable

31 European Roma Rights Centre, Interights and Migration Policy Group, above n 16, 56.

32 Wasby, *Race Relations Litigation in an Age of Complexity*, above n 25, 160.

33 *Ibid* xv.

34 *Ibid* 229.

35 *Ibid* 223.

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

reputation in the court. Usually, such organisations also have lawyers that, through repeat litigation, build up an expertise in areas of law relating to the human rights issue and a rapport with the judges on the court.

This form of litigation is sometimes referred to as impact litigation because legal issues are sometimes selected in order to have the largest social and political effect in addressing the human rights violation. In addition, litigation in relation to the issues selected may be pursued in the form of class actions so that the resultant remedies obtained as a result of a favourable judgment will have the widest possible effect.³⁷

Several different variants of the planned litigation approach have emphasised the results of social science studies on a human rights issue as evidence in building the relevant cases. Such studies are used to bring to the attention of the court the practical and human costs of human rights violations continuing. This is what was done by the NAACP in the *Brown* case.³⁸ A more recent example is the use of social science data by the Roma Rights Centre in the case of *DH v The Czech Republic*³⁹ in the European Court of Human Rights in 2007.⁴⁰

Even when a favourable decision is obtained in planned litigation, that is usually not the end of the matter.⁴¹ Favourable decisions are often followed by equally extensive litigation as to the remedies the court should give. In the US it has not been unusual for a court to use equitable remedies to, in effect, oversee institutions involved in human rights violations to ensure that they change their conduct so that they end up complying with the orders made by the court.⁴² In other instances, such as in litigation in Central Europe, there have not been such extensive jurisprudences on remedies and organisations have had to rely more on the political effects of such judgments.⁴³

Planned litigation emphasises proactive agenda setting and control. This does not mean, however, that litigation in response to outside events does not occur. Sometimes it is necessary to engage in reactive litigation to maintain the plan (or even the organisation) in the face of adverse events.⁴⁴ It has also sometimes been necessary for such organisations to litigate reactively to respond to concerns and demands arising from the community suffering the human rights violation.⁴⁵

37 Wasby, *Race Relations Litigation in an Age of Complexity*, above n 25, 211.

38 Kluger, above n 13, 315 ff.

39 (2008) 47 EHRR 3.

40 Goldston, 'Ending Racial Segregation in Schools', above n 15, 2.

41 Tushnet, above n 21, 144.

42 Kalaydjieva et al, above n 19, 108.

43 Goldston, 'Public Interest Litigation in Central and Eastern Europe', above n 9, 499–500.

44 Wasby, *Race Relations Litigation in an Age of Complexity*, above n 25, 45.

45 Tushnet, above n 21, 147–8.

IV SOME EMERGING KEY FEATURES OF LITIGATION BY AUSTRALIAN HUMAN RIGHTS ORGANISATIONS IN THE HIGH COURT

The preliminary information obtained using the methodology discussed in Part II of electronically searching for case law reports involving Australian human rights organisations in High Court litigation (supplemented by other cases known to the author as having been conducted by such organisations and referred to below) suggests a pattern.

Firstly, a number of the cases located exhibit what might be called the ‘Coe’ approach after the litigation in *Coe v Commonwealth*.⁴⁶ In the *Coe v Commonwealth* proceedings an Indigenous litigant unsuccessfully challenged in the High Court the original assertion of sovereignty over Australia by Great Britain. While the case in many ways concerned the form of the statement of claim in the matter, the appellant principally lost because two justices of the Court found that a challenge to sovereignty did not amount to an assertion of any reasonable cause of action.⁴⁷ As such, regardless of the procedural details of the case, the author uses it as a model or heuristic devise to characterise a certain approach to litigation.

That litigation approach is one that makes no attempt to erode adverse precedent gradually. Without being a repeat player in the court, or having educated the court and obtained its trust, an applicant using such an approach seeks to have the court dramatically develop existing jurisprudence in a single case in a way that the court may be reluctant to do. The preliminary data obtained suggests that virtually all of the cases in which Australian human rights organisations act for parties fall within such a model.

Typically, such challenges lead to orders against the applicant. An example in that regard might be the decision in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*.⁴⁸ Occasionally this approach does lead to favourable orders when the case is brought at the exact moment when, coincidentally, the approach of the High Court is favourable (as in *Mabo v Queensland [No 2]*).⁴⁹ However, such coincidence appears to be an increasingly rare occurrence.

Secondly, the predominant approach to litigation by Australian human rights organisations in the cases located involved the use of amicus curiae briefs.⁵⁰

46 (1979) 24 ALR 118.

47 Ibid 128, 130, 138 (Gibbs and Aikin JJ).

48 (2016) 257 CLR 42. See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 in which HRLC also acted.

49 (1995) 175 CLR 1 (*Mabo*). *Mabo* was obviously not brought by an Australian human rights organisation, but nevertheless is a useful illustration of the point.

50 See, eg, the HRLC in *Momcilovic v The Queen* (2011) 245 CLR 1 and *NSW Register of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, PIAC (as amicus for the Media, Entertainment and Arts Alliance) in *Levy v Victoria* (1997) 189 CLR 579 and Amnesty International Australia in *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

Rather than commencing cases themselves, Australian human rights organisations appear to try to get their voices heard in cases that are already before the court through the vehicle of amicus briefs. The located cases, listed in footnote 50, also show that sometimes Australian human rights organisations write amicus briefs for other organisations that have an interest in the subject matter of the proceedings.⁵¹ A consideration of how this use of amicus briefs might be seen to be problematic is set out below.

Thirdly, when test cases (rather than amicus briefs) are employed, the case data obtained suggests that they involve a single unplanned case. The preliminary data does not show any evidence of an overarching plan or blueprint for the litigation or that the cases have been sought out by the organisation through ‘case hunting’ for favourable fact patterns.

In short, the preliminary data obtained by the author using the methodology discussed in Part II does not show any evidence of the use of planned litigation by Australian human rights organisations in the High Court in the recent past.⁵² It suggests a much more reactive and episodic use of litigation and a much more extensive use of amicus briefs than in planned litigation. While only suggestive of a pattern due to the nature of the preliminary data, the above picture appears at least clear enough to form a basis for a discussion of how use of planned litigation could or should change such a pattern.

This focus on amicus briefs as a conscious approach is confirmed by an earlier article by Philip Lynch, the first director of the HRLC, where use of amicus briefs is described as an aim of the HRLC.⁵³

The article also sets out what it describes as a human rights approach to the relationship between lawyer and client at the HRLC that was said to involve the client having a say and participating in the legal services provided to them.⁵⁴ Planned litigation necessarily involves a balancing of the individual interests of the client with the wider structural goals it tries to obtain while acting ethically and on the client’s instructions. As long as it involves acting on such instructions and the client is fully informed about the litigation and consents to it, a planned litigation approach is generally seen as having a human rights framework in its dealing with its clients.

It is unclear whether the approach in the article continues in some Australian human rights organisations and whether it is understood to preclude planned litigation because of such balancing. If it was so understood, it would form a barrier to the use of planned litigation by Australian human rights organisations.

51 See, eg, PIAC (for the Media, Entertainment and Arts Alliance) in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

52 It is unclear to the author whether the old case of *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165 (which the author understands to have been bought by PIAC) may have contained elements of the planned litigation approach by its use of a representative discrimination complaint by Donka Najdovska (see the judgment of McHugh J: at 192 ff).

53 Lynch, above n 8.

54 *Ibid.*

V WHAT PLANNED LITIGATION MIGHT ADD TO HUMAN RIGHTS LITIGATION IN THE HIGH COURT

As mentioned in the introduction to this article, preliminary data suggests that Australian human rights organisations have been relatively unsuccessful in their litigation in the High Court. It is acknowledged that such data does not currently constitute a fully formed research case for the use of planned litigation in Australia. To achieve such a purpose, research into the litigation of Australian human rights organisations would need to be (and should be in the future) buttressed and expanded with more extensive evidence and analysis.

However, Australian human rights organisations should always be open to discussions about how to achieve better results and be knowledgeable about approaches to human rights litigation around the world. Preliminary data suggesting that the approach of human rights organisations to High Court litigation may not be without its flaws merely adds to the common-sense proposition that such open discussions should be occurring. It is merely an opening for much needed debates that should be occurring anyway. A fully formed research case for problems in Australian human rights litigation, which may take years to construct, should not be a prerequisite to such discussions. Otherwise, important debates concerning Australian human rights litigation could effectively be stifled for years.

There are a number of ways in which it may be argued, even without complete research data, that adopting elements of the planned litigation approach may give rise to the possibility of increasing the success of the litigation of Australian human rights organisations in the High Court.

Firstly, the emphasis on control in planned litigation might present to the High Court cases that would educate it about human rights violations on the ground and that it would find it harder to dismiss than it has in the past. Given the small number of human rights organisations in Australia compared to the US and other jurisdictions it should be relatively easy to ‘simplify the field’ and control the progress of cases up to the High Court. This would be especially the case if Australian human rights organisations developed more extensive networks to enable them to ‘case find’ applicants with the most favourable fact patterns. Cases could then be put when the political atmosphere was more favourable, the atmosphere on the High Court was more favourable, and when the organisation itself was best placed to run the case.⁵⁵

Secondly, the fact that planned litigation in the full form outlined in this article is generally done through a number of cases in a litigation ‘programme’ should mean that such organisations would be in the High Court far more than at

55 As mentioned above, it is argued that there are still significant opportunities for success in human rights litigation in the High Court. As a result, even taking political atmosphere, High Court atmosphere and organisational factors into account, it would seem that planned litigation would still result in more such litigation before the High Court than currently occurs.

present. This might give an organisation's lawyers the chance to socialise the Court about the nature of the problem, to gain the trust and respect of the Court and to gain the advantages of being a 'repeat player'. Unlike in the 'Coe' approach, the Court should not be approaching the issue cold. It would be likely to know the lawyers presenting the case, it should know the issues and adverse precedent should have been sufficiently eroded to make it less of a leap for the Court to hand down a favourable ruling.

Thirdly, amicus curiae briefs are generally not favoured by those engaged in planned litigation because they do not allow for sufficient control.⁵⁶ While they are economic in a sense because they avoid the expenses of running a case as well as having a possible adverse costs order made against the organisation, their great drawback is that the organisation does not get to choose the case in which they put their argument. Amicus briefs are inherently reactive. Planned litigation could open up the possibility of such organisations being proactive and setting the agenda themselves.

In addition, the above preliminary data also suggests that the use of amicus briefs by Australian human rights organisations in the High Court might not have been very effective. This result is not very surprising given the historical resistance of the High Court to allowing amicus briefs in its proceedings.⁵⁷

It may be argued that human rights litigation using amicus briefs has wider social, political and educative effects and that a lack of favourable orders in the High Court does not change this. A wider and more comprehensive analysis of the litigation by Australian human rights organisations in the High Court than in this article, as discussed above, would indeed be required to properly evaluate such factors.

However, in the absence of favourable orders by the Court such wider effects of litigation can be limited. Sustained losses in a forum such as the High Court may legitimise the position of those who oppose human rights implementation. It can also have real and adverse effects for those clients whom the Court does not protect from human rights violations as well as larger communities that suffer similar violations. That is, a loss in the High Court can have negative structural effects. Seeking ways to achieve favourable orders in the High Court, therefore, even if it is not the only priority must remain an important one.

The viability of any such planned litigation in the Australian context would be informed by a number of factors. Jack Greenberg, one of the Director-Counsel at LDF, once remarked that two elements of conducting planned litigation were having a sufficient network to allow you to search for possible clients and to

56 Wasby, *Race Relations Litigation in an Age of Complexity*, above n 25, 158.

57 See George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365, 392. What is more surprising is that the relative rarity of amicus briefs appearing in the High Court (at 386) when read together with the apparent emphasis on amicus briefs by human rights organisations suggests that litigation by such organisations itself is also relatively rare.

have sufficient funds to engage in such litigation.⁵⁸ Australian human rights organisations are unlikely to find insurmountable obstacles to building greater links with legal aid organisations, relevant law firms and civil society organisations to allow them to source appropriate clients. However, planned litigation is expensive. This is because the relevant organisation runs multiple cases as well as being involved in planning, client finding and social science research in relation to those cases.

It is well known that Australian human rights organisations currently have fewer resources than human rights organisations in North America and Europe (even allowing for the differences in population).⁵⁹ Historically it would seem arguable that the inability of Australian human rights organisations to obtain resources from the non-government sector in Australia comparable to those obtained in North America and Europe has been a critical limitation to their success. This issue, however, can be characterised (at least predominately) as an internal barrier to success rather than an inevitable consequence of the Australian litigation environment.

It would seem arguable that many of the means used to obtain funding by European and North American human rights organisations have yet to be fully tried by Australian human rights organisations. For example, as in Eastern Europe, money could be obtained from international human rights funds to enable an organisation to have sufficient funds to undertake planned litigation. Alternatively, currently litigating Australian human rights organisations, in addition to raising more funds, might be able to pool their funds to jointly run cases in some circumstances.

The possibility of adverse costs orders as a result of the loser pays rule in Australian courts has also historically been a significant impediment to human rights litigation. The effect of such orders as a barrier to litigation should not be underestimated. However, should greater resources be able to be obtained, as discussed above, such orders may be less of a barrier. Planned litigation has been successfully undertaken in other jurisdictions where such costs orders are made, such as in Eastern Europe,⁶⁰ where there were sufficient resources to absorb or avoid the costs of such orders.

In addition, the development of the jurisprudence on public interest costs orders⁶¹ in Australia could be a goal of a planned litigation programme itself

58 Jack Greenberg, 'Litigation for Social Change: Methods, Limits and Role in Democracy' in Jack Greenberg, *Judicial Process and Social Change: Constitutional Litigation Cases and Materials* (West Publishing Co, 1977) 581, 587.

59 Even though the author understands that this is the case he is unaware of a recent discussion of this issue. However, if one compares the older material concerning Australian human rights Non-Governmental Organisations ('NGOs') in Simon Rice and Dr Scott Calnan, 'Sustainable Advocacy: Capabilities and Attitudes of Australian Human Rights NGOs' (Report, Australian Lawyers for Human Rights and Australian Human Rights Centre, 2007) 27–9 with Calnan, above n 2, 186 ff one can see the magnitude of the difference in resources approximately 10 years ago.

60 Goldston, 'Public Interest Litigation in Central and Eastern Europe', above n 9, 497.

61 See, eg, *Oshlack v Richmond River Council* (1998) 193 CLR 72.

given its intimate connection with the possibility of carrying out other such planned litigation. If such a jurisprudence was successfully developed it would offer some protection from such orders. In the UK an extensive system of protective costs orders has developed along similar lines.⁶²

VI CONCLUSION

It is not necessary to reject other political and social means of campaigning for human rights in Australia in order to accept that more successful human rights litigation may be one means of obtaining, as part of an overall plan, better results in human rights protection. Nor is it necessary to accept that planned litigation is as planned as it may appear from the outside. Cases brought in planned litigation campaigns do indeed mature along unexpected lines and unexpected events occur that change how litigation is approached. Planned litigation would not eliminate the need for sound judgment in litigation.

There is a need for further and better research in the future to evaluate the effectiveness of litigation by Australian human rights organisations in the High Court. However, while further research might better inform discussions about such litigation, a conversation about how such litigation might achieve better results should be occurring anyway. The outline of planned litigation and the preliminary data discussed in this article is intended to further such a conversation in the present as well as to raise the possibility of better research in the future.

The proactive and systematic elements of the approach of planned litigation, the possible benefits it might contain of organisations being repeat players in the High Court and of structural human rights change mean that consideration of employing it to a greater extent in Australia would appear to be long overdue. Even if it does not create greater success in litigation it may contribute to a long-term solution.

62 See Pinsent Masons, 'Environmental NGOs Win Judicial Review Over Aarhus Costs Cap Rules', *Out-Law.com* (online), 20 September 2017 <<https://www.out-law.com/en/articles/2017/september/environmental-ngos-win-judicial-review-over-aarhus-costs-cap-rules/>>.