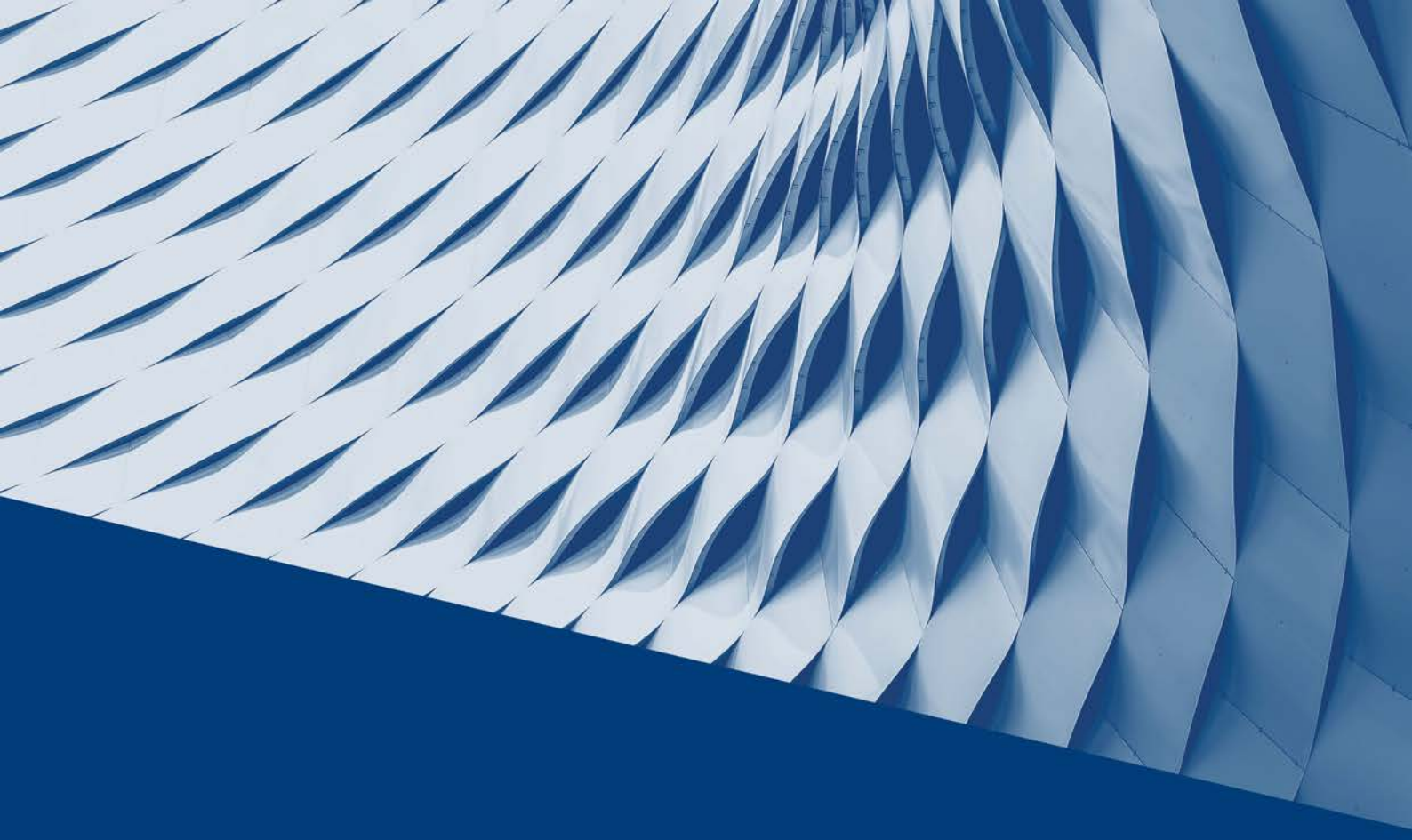

Cost Model for Commonwealth Anti-Discrimination Laws

ACTU submission to the Attorney-General's Department on the Review into an appropriate cost model for Commonwealth anti-discrimination 2022

ACTU Submission, 14 April 2023
ACTU D. No 18/2023

ACTU
australian council of trade unions

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Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Reflecting the diversity of the Australian workforce, the union movement includes people from all backgrounds and walks of life, including young people, members of the LGBTIQ+ community, First Nations workers, people with disability, and workers from religiously, culturally and linguistically diverse backgrounds. Over 50% of Australian union members are women. Australian unions have a long and proud history of fighting for workplaces free from racism, sexism and all forms of discrimination and prejudice, and standing up for justice, safety, respect and equality for all workers.

The Australian union movement has a significant interest in the effectiveness of Australia's anti-discrimination and human rights framework. Since the commencement of anti-discrimination laws, the majority of complaints have related to employment.[1] This is because work is absolutely central to human dignity and our ability to live a decent life. The significant power imbalance between employers and workers means that workers are particularly vulnerable to exploitation, discrimination and other human rights abuses. In particular, the Australian union movement made a significant contribution to the National Inquiry into Sexual Harassment in Australian Workplaces and has advocated for the implementation of all 55 recommendations of the Respect@Work Report since it was published in 2020.

[1] Australian Human Rights Commission 2021-22 Complaint statistics show that in 2021-22, employment made up 22% of complaints under the Disability Discrimination Act; 73% of complaints under the Sex Discrimination Act; 38% of complaints under the Racial Discrimination Act and 41% of complaints under the Age Discrimination Act.

Background

The ACTU welcomes the opportunity to make a submission to the Review into an appropriate cost model for Commonwealth anti-discrimination laws (**the Review**). The Review concerns the final legislative recommendation arising out of the Respect@Work Report (Recommendation 25). The Review came about after costs provisions that were initially included in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect@Work) Bill 2022* were removed, in response to concerns raised by many in the sector, including the community legal sector, legal professionals, unions, academics and others. The matter was subsequently referred by the government to the Attorney-General's Department for review, resulting in the publication of the *Consultation Paper: Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws* (February 2023) **(the Consultation Paper).**

The ACTU welcomes the Review and the steps taken to date by the government to ensure that the costs model ultimately adopted achieves the aims of the Respect@Work Report. The ACTU also commends the government on the progress it has made in implementing the 55 Respect@Work recommendations, including 12 out of 13 recommendations regarding legislative reform.

Summary of ACTU position

The ACTU's recommendation is that the government should legislate to adopt the Equal Access costs model into the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), as it provides the most appropriate costs protection in discrimination matters. Out of all the possible costs model that could be adopted, it is the most closely aligned with the intention and policy objective of Recommendation 25 of the Respect@Work Report, and the aim expressed in the Consultation Paper of 'increasing access to justice.'[2] It solves the access to justice problems and the deterrent effect inherent to other costs models. It also underscores the wider public interest in people who have experienced discrimination or sexual harassment being able to vindicate their legal rights. Costs provisions similar to the equal access model already exist in several Australian statutes, as well as in international jurisdictions such as the United States.

Discrimination and sexual harassment are still widespread and pervasive in Australia. One in five Australians have experienced workplace sexual harassment over the last 12 months, with one in

[2] Attorney General's Department (February 2023) Consultation Paper: Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws ('Consultation Paper') at page 11.

three reporting workplace sexual harassment over the last five years.[3] The impact is disproportionately felt by women, with 41 per cent of women reporting experiences of sexual harassment, compared to 26 per cent of men.[4] Yet only 18% of people who experience sexual harassment at work made a formal report or complaint.[5]

In circumstances where discrimination and sexual harassment are so widespread and damaging, where so many barriers exist to people bringing forward complaints, and where there is often a large power imbalance between applicants and respondents, the implementation of the Equal Access model removes a significant barrier to access to justice, and helps to address the deep structural inequalities that exist in our society, which are all too often replicated by our legal system. The Equal Access costs model is the only model that does not entrench and exacerbate power imbalances and barriers to access to justice.

Issues arising from the current costs framework

As outlined in the Consultation Paper,[6] currently, there are no specific provisions guiding how costs are to be awarded in discrimination matters before a Federal Court. Rather, section 46PO of the AHRC Act refers to the relevant provisions in the *Federal Court of Australia Act 1976* (Cth)[7] and the *Federal Circuit and Family Court of Australia Act 2021* (Cth).[8] These provisions provide the courts with broad discretion to award costs as they see fit, and generally follow the practice that costs are awarded after the event according to who was successful ('costs follow the event'). As part of their broad discretion, the courts can also issue no costs order which means that costs are not to be awarded, leaving each party to bear their own costs. The AHRC Act also specifically allows these courts to have regard to the rejection of settlement offers in deciding whether to award costs.[9]

In discrimination matters, it is most common for the courts to either make no costs orders (meaning each party bears their own costs), or to award costs to the successful party (meaning the unsuccessful party is required to pay the costs of the other party, as well as their own.)[10]

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[3] Australian Human Rights Commission, Time for respect: Fifth national survey on sexual harassment in Australian Workplaces (Report, November 2022) ('Fifth National Survey') at pages 12, 49.
[4] Ibid at page 50.
[5] Ibid at page 15.
[6] Consultation Paper at page 9.
[7] S43 Federal Court of Australia Act 1976 (Cth).
[8] S214 Federal Circuit and Family Court of Australia Act 2021 (Cth).
[9] S46PSA Australian Human Rights Commission Act 1986 (Cth)
[10] Consultation Paper at page 10.

Recent research conducted by the ANU into damages and costs in sexual harassment litigation[11] (**ANU Report**) has found that across federal discrimination proceedings, while no costs orders are the most common order regardless of outcome, the number of costs orders made against applicants has increased over time, and fewer costs orders are made against respondents.[12] These trends are particularly evident in sexual harassment matters, where applicants have been ordered to pay the respondents costs in 56% of cases where the applicant was unsuccessful and sometimes even where the applicant was successful.[13] Compounding these trends, since discrimination proceedings have moved to the federal courts, costs orders have increased significantly.[14] The ANU report also found that the number of cases proceeding to court for all types of discrimination at the federal level are declining.[15]

The advantage of the current costs model is that when applicants are successful, their legal costs are often covered by respondents. The disadvantage is that when applicants are unsuccessful, they become liable for the legal costs of respondents. As has been well established, the risk of an adverse costs order is a strong deterrent to applicants seeking redress for discrimination and sexual harassment,[16] particularly given there is often an economic power imbalance between applicants and respondents. Exacerbating this is the risk that any damages a successful applicant may be awarded may not be enough to cover their own legal costs (given the low level of damages and the high level of costs). The current costs model also has the following disadvantages:

- There is a lack of certainty for applicants as to how costs will be awarded – if successful, there is no guarantee that their costs will be covered, and they may still end up being liable for the respondent's costs.
- It does little to mitigate the risk of paying the costs of the respondent where an applicant is unsuccessful.

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[11] Margaret Thornton, Kieran Pender and Madeleine Castles (25 March 2022) Damages and Costs in Sexual Harassment Litigation ('ANU Report').
[12] Ibid at page 39.
[13] Ibid at pages 34-38.
[14] Ibid at page 42
[15] Ibid at page 27.
[16] Australian Human Rights Commission (2020) Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces, (**Respect@Work Report**), page 507, Productivity Commission Report (2004) Review of the Disability Discrimination Act 1992 at pages 58, 136, 368-369; Senate Standing Committee on Legal and Constitutional Affairs Report (2008) Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality at pages 72-73, 84-85 and 156 ; Australian Human Rights Commission (December 2021) Free and Equal: A reform agenda for federal discrimination laws, at pages 191-194; Legal and Constitutional Legislation Committee (June 1997) Human Rights Legislation Amendment Bill 1996 at [4.40]–[4.42]; Australian Government Attorney-General's Department (November 2012) Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes, at 94.

- It deters applicants from initiating civil proceedings, and acts as a disincentive to pursuing litigation, even if they have a strong claim.
- It favours parties with more resources, creating imbalances between parties and access to justice issues for marginalised communities.
- It perpetuates a culture where applicants lose the opportunity to have a judicial determination which results in a lack of development of legal precedent and decisions that may encourage systemic change to workplace cultures. There is also a lost opportunity for the development of judicial expertise and specialisation, and to revisit the appropriate level of damages, keeping damages awards low. This limited jurisprudence makes advising applicants on the merits of their claim difficult. All of this only adds to a lack of certainty for applicants as to their prospects of success.[17]

These were among the reasons that the Australian Human Rights Commission, in the Respect@Work Report and Free and Equal: A reform agenda for federal discrimination laws (**Free and Equal Position Paper**) recommended moving to a different costs model.

Options for reform

The Consultation Paper explores four options for reform – hard costs neutrality, soft costs neutrality, an equal access cost model, and the applicant choice model.

Hard cost neutrality

The model in section 570 of the *Fair Work Act 2009* (Cth) (**FW Act**) can be called a 'hard cost neutrality' model or a 'no costs' model. The default position under this model is that each party to a proceeding bears their own costs, unless a party instituted proceedings vexatiously or without reasonable cause, or a party's unreasonable act or omission cause the other party to incur costs, or a party unreasonably refused to participate in a matter before the Fair Work Commission (**FWC**).

The advantage of this model is that unsuccessful applicants are protected from paying the legal costs of respondents, unless their claim is made vexatiously or without reasonable cause, or there has been an unreasonable act or omission. This gives applicants considerable certainty that they will only be responsible for their own costs, unless one of the above exceptions applies. The

[17] Australian Human Rights Commission (December 2021) Free and Equal: A reform agenda for federal discrimination laws ('Free and Equal Position Paper') at page 191.

disadvantage is that successful applicants are generally unable to recoup their legal costs from respondents, unless the respondent's unreasonable act or omission caused them to incur costs.

In practice, this is also a significant deterrent to applicants seeking redress, as regardless of the outcome they will need to pay their own legal costs, which can be prohibitive, and often their legal costs will be equal to or greater than the compensation awarded, leaving them out of pocket and nullifying their damages. Under this model, applicants are far more unlikely to be able to secure pro bono assistance or assistance from private solicitors on a 'no win, no fee' basis, avenues which provide many applicants with access to claims that they could not otherwise afford to bring. This is because it would not be financially viable for no win no fee legal practices to act for applicants, given the high risk of costs exceeding damages.[18] We note that the Consultation Paper states that "this model may encourage more public interest pro bono litigation, with representative organisations having certainty that they will not face an adverse costs order"[19] – however without the ability for such organisations and legal representatives to recoup their costs (except in cases where their clients are successful and get a large damages award that exceeds costs), we doubt that this model would in fact lead to a significant increase in public interest litigation, given the very high costs involved in this jurisdiction. We note that recovery of costs is not just an issue for the viability of no win no fee arrangements – it also encourages the provision of pro bono services by lawyers and counsel and hence is an important access to justice issue because it facilitates access to legal representation for applicants.[20] This is likely to mean that in practice, many people are effectively left without any recourse, as they will not be able to afford legal representation without pro bono or no win no fee arrangements.

We note that concerns have been raised that a hard costs neutrality model will create new access to justice issues in the form of disincentivising pro bono work, and the difficulty of finding legal teams willing to assist on a non-recoverable basis (especially where complex cases may run for years) is already evident in proceedings under the FW Act.[21] This has led Grata Fund to conclude that expanding this approach would have a limited impact on improving access to justice and public interest litigation,[22] including important test cases and class actions.

There are also important flow on effects of applicants being able to recover their costs for other organisations that represent applicants such as unions. The capacity of unions to run these kinds

[18] ANU Report at page 15.
[19] Consultation Paper at page 24.
[20] Grata Fund (2022) *The Impossible Choice: losing the family home or pursuing justice – the cost of litigation in Australia* 2<https://www.gratafund.org.au/adverse_costs_report> at pages 28-29.
[21] Ibid at page 32.
[22] Ibid.

of cases could increase significantly if they are able to recover the legal costs associated with the proceedings. This is also true for the new provisions that allow representative bodies such as unions to make representative applications to court on behalf of people who have experienced unlawful discrimination. If those bodies are able to recover the legal costs associated with the proceedings, they are far more likely to be able to pursue more claims.

The Consultation Paper flags as a disadvantage of this model that legal representatives for respondents would be unlikely to be able to recoup their costs, which could deter legal representatives form acting on a no win no fee basis for respondents, and create issues for respondents securing legal representation.[23] The ACTU is unaware of any evidence that this is a common model by which respondents receive legal assistance. We believe that in the vast majority of matters, 'no win no fee' arrangements would not be offered to respondents – rather respondents would be required to pay their legal fees as they go.

Another disadvantage of this model is that it may lead to a rise in well-resourced respondents engaging in strategic delay tactics that increase the legal costs of the applicant and therefore limit their ability to continue proceedings. Unless respondents are 'on the hook' for costs, they are incentivised to engage in such delay tactics to put pressure on applicants to settle or discontinue the proceedings. Whilst the Consultation Paper frames this as a risk for respondents facing unmeritorious claims too,[24] the likelihood of an applicant being more well resourced than a respondent is very low. Practically speaking, given the difficulties inherent in recovering damages from individuals, cases that proceed to court which involve individual respondents are very rare – it is far more often an organisation (such as an employer) and sometimes an individual respondent in addition to the organisation. In an overwhelming majority of cases, there will be a significant power and resource imbalance between the applicant and respondent. Furthermore, there are other protections against unmeritorious claims that respondents have the benefit of, such as the ability to have proceedings struck out,[25] the ability for the AHRC to terminate unmeritorious complaints,[26] and the fact that complaints terminated on these grounds are only able to proceed to court with the leave of the court.[27]

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[23] Consultation Paper at page 24-25.
[24] Consultation paper at page 25.
[25] Rule 16.21 of the *Federal Court Rules 2011* (Cth)
[26] The President of the AHRC must terminate a complaint if they are satisfied that it is trivial, vexatious, misconceived or lacking substance; or there would be no reasonable prospect that the court would be satisfied the complaints amounts to unlawful discrimination – s46PH *AHRC Act*. The President also has a discretion to terminate complaints that they consider do not amount to unlawful discrimination.
[27] S46PO *AHRC Act*; Free and Equal Position Paper at page 192, 200.

The Respect@Work Report recommended that the costs provisions in the AHRC Act be changed to be consistent with s570 of the FW Act. This was in recognition of the fact that costs orders act as a disincentive to applicants pursuing discrimination and sexual harassment matters, and concerns about the negative impact of costs orders on access to justice, especially for vulnerable members of the community. The Respect@Work Report did also acknowledge, however, that a no costs model would disadvantage successful applicants.[28] Unfortunately, the reality is that the failure to reward successful applicants with a favourable costs order often has the opposite effect than what was intended by the Respect@Work Report's recommendation, by acting as a deterrent to applicants.

The Australian Human Rights Commission (**AHRC**) has moved away from advocating for this model, including for these reasons and concerns about access to justice.[29] Instead, in the Free and Equal Position Paper published by the AHRC in 2021, it recommended a soft cost neutrality model be adopted.[30]

Soft cost neutrality

Soft cost neutrality provisions were initially included in Schedule 5 of the Respect@Work Bill 2022, but were removed after concerns were raised by many stakeholders about how it would operate. As outlined in the Consultation Paper, the majority of Australian states and territories have a soft costs neutrality model for dealing with costs in discrimination matters before tribunals.[31]

Under this model, the default position is that parties bear their own costs, but the tribunal or court retains a broad discretion to award costs otherwise where it considers this appropriate, often in reference to a list of factors to be taken into account.

The costs provisions originally included in the Respect@Work Bill 2022 provided that the parties will bear their own legal costs,[32] unless the court considers that there are circumstances that justify making an order as to costs.[33] The court could have regard to a number of factors when considering whether there are circumstances justifying a costs order, including the financial circumstances of the parties, the conduct of the parties, whether any party has been wholly unsuccessful, whether any settlement offers have been made, whether the subject matter of the proceedings involves an

[28] Respect@Work Report at page 507.
[29] Free and Equal Position Paper at pages 191-200.
[30] Ibid.
[31] Consultation Paper at page 17, 25.
[32] s46PSA(1) Respect@Work Bill 2022
[33] s46PSA(2) Respect@Work Bill 2022

issue of public importance, and any other relevant matters.[34] Part of the reasoning for this approach given in the Explanatory Note was that it would provide applicants with "a greater degree of certainty".[35]

This model still gives courts a very wide discretion to order costs against a party. Whilst this may sometimes result in applicants recouping their legal costs, it may equally result in applicants being liable for the costs of respondents. There is therefore still a large degree of uncertainty for applicants (and respondents) in this model.

Whilst this model does provide some ability for courts to consider relevant matters that might make it more just to award costs in favour of an applicant in certain circumstances, there is no guarantee or certainty that applicants can rely on this to any significant degree. The broad discretion means that respondents can equally be awarded their costs, and does not alleviate access to justice concerns in any meaningful way for applicants. The Consultation paper notes the AHRC's position is that "*this approach to costs is more consistent with that in other Australian discrimination law jurisdictions, and better facilitates access to justice while providing continuing capacity for courts to make costs orders appropriate to the conduct of the parties and the merits of the matter*."[36]

Consistency with other jurisdictions is not desirable in and of itself if the costs provisions in those jurisdictions are not facilitating access to justice. The reality is that courts consider the matter of costs from within a narrow litigation procedure paradigm, and all the soft costs neutrality model does is to perpetuate this.

We note that the Free and Equal Position Paper did not consider the equal access model. The Paper lists a range of alternative approaches to costs which were suggested to the Senate Standing Committee on Legal and Constitutional Affairs in 1997,[37] and did not include the equal access model. The Paper contained a passing reference to two organisations (the Disability Discrimination Legal Service and Victoria Legal Aid) that supported the principles of the equal access model,[38] but the model itself was not named or explored in any depth as an alternative. The Paper therefore did not weigh the benefits of the equal access model against any other model, including a soft costs neutrality model. Instead, the Paper concluded that the default position should be that parties bear their own costs, with the court retaining a discretion to award costs in the interest of

[34] s46PSA(3) Respect@Work Bill 2022
[35] Explanatory Note at [41]; see also Explanatory Memorandum at [321].
[36] Consultation Paper at page 27, Free and Equal Position Paper at page 201.
[37] Free and Equal Position Paper at page 195.
[38] See Free and Equal Position Paper at pages 192-193, 200.

justice, according to certain criteria, in order to 'balance' the interests of the parties. This model is very similar to the costs provisions contained in the *Family Law Act 1975* (Cth).[39]

Discrimination matters are fundamentally different to family law matters. In the vast majority of cases, respondents are organisations, and applicants are individuals – whereas family law matters are between two individuals. Any entrenched power imbalances and inequalities in family law matters exist on a much smaller scale than in anti-discrimination matters, which are about fundamental societal inequities manifesting in the unfavourable treatment of people based on a protected attribute. All that a costs neutrality model does in these circumstances is to entrench and exacerbate existing inequalities and power dynamics.

Other problems with the costs neutrality model include:

- the matters to be taken into account allow courts an extremely wide latitude to make costs orders against applicants;
- it will not reduce the uncertainty faced by applicants, as wide judicial discretion already exists in the current costs framework, and has done little to alleviate issues of access to justice;
- well-resourced respondents will be able to pursue effective strategies to obtain costs orders, including through the well-timed and cynical use of settlement offers;
- applicants are more unlikely to secure pro bono assistance or assistance from private solicitors on a no-win no fee basis under this model due to the presumption being that the parties are to bear their own legal costs;
- it will have a dampening effect on public interest litigation, class actions and important test cases;
- There is a risk that this model still allows to a degree for respondents to engage in delay tactics to frustrate the ability of an applicant to continue court proceedings, or put pressure on them to settle;
- In circumstances where applicants are likely to be individuals, and respondents are more likely to be corporate entities or organisations capable of both engaging highly expensive legal teams, and bearing the costs of their decision to do so, the retention of a large discretion to order costs against applicants will in practice deter many from coming forward to seek redress, especially vulnerable applicants and applicants without ample financial resources;

[39] Free and Equal Position Paper at pages 196-201.

- Taking a costs neutrality approach to a relationship that is characterised by endemic inequality only serves to entrench that inequality.

Therefore, our view is that the soft costs neutrality model will not solve the access to justice issues that the AHRC believes it will. This is demonstrated further by the fact that existing state and territory soft costs neutrality models have not resulted in significant numbers of cases being pursued in tribunals.

It is also notable that all of the soft costs neutrality models outlined in the Consultation paper, and the costs provisions that were originally included in the Respect@Work Bill, are focused on typical narrow litigation procedure considerations – for example, which party wins the case, settlement offers made, conduct of the parties, the merit of the proceedings, the strength of the claims made by the parties, the nature and complexity of proceedings and so on. To take one of these factors as an example – a focus on settlement offers carries a real risk that a soft costs neutrality model will fixate on financial outcomes and financial offers – however applicants are often seeking important non-financial terms, not to mention the overriding public interest in some cases being run – and this could easily be undermined by the strategic use of settlement offers by respondents.

None of these factors encompass the broader public interest in people who have experienced discrimination and harassment being able to vindicate their rights, both for themselves but also on behalf of society as a whole. Given that we have adopted an individualist approach to addressing societal issues, with the individual complaints mechanism still being the primary mechanism we have for the enforcement of anti-discrimination laws, and the burden of discrimination mostly falling on individuals, this is a key consideration - yet it is completely missing from the state and territory costs models, and only obliquely referred to in the Respect@Work Bill provisions in the consideration of "whether the subject matter of the proceedings involves an issue of public importance."

Whilst the Consultation Paper states that the role of the criteria in this costs model is to direct the court to consider a range of things that are particularly relevant to discrimination matters, such as any power imbalance between parties and the public importance of individuals being able to enforce their right to be free from discrimination,[40] these crucial considerations are not properly reflected in any soft costs neutrality model currently in use in Australia, or in the original provisions in the Respect@Work Bill.

[40] Consultation Paper at page 26.

The vast majority of discrimination proceedings (that are not instituted vexatiously or without reasonable cause) involve a matter of public importance – but under the Respect@Work Bill provisions this was just one of a range of other factors to be taken into account, and was liable to be interpreted very narrowly given its phrasing. Further, power imbalances in discrimination matters involve so much more than the financial circumstances of the parties. Rather, they reflect and entrench fundamental structural inequalities in society that are the reason it is so difficult for applicants to enforce their rights in the first place.

The soft costs neutrality model is not set up to properly grapple with these issues, given it gives the discretion entirely to courts, and the factors to be taken into account are mostly focused on narrow litigation considerations that do not, and arguably cannot, adequately deal with the inherent difficulties involved in bringing discrimination proceedings. Instead, these overriding considerations and the public interest in people being able to vindicate their rights need to be given much greater expression – something that we believe can only be done effectively through the Equal Access costs model.

Applicant choice model

This model would enable an applicant at the outset of court proceedings to elect one of two options as to how costs are resolved in the case at hand. The applicant could choose either a 'costs follow the event' model (whereby the unsuccessful party has costs awarded against them) or a hard cost neutrality model (where each party bears their own costs, unless a party acts unreasonably or vexatiously).

This model was considered in the AHRC's Free and Equal Position Paper, but it was not recommended as the costs model that should apply in discrimination matters.

The Consultation Paper asserts that this model "would empower applicants to control how costs are settled and provide them with a measure of flexibility based on their circumstances,"[41] such as their financial situation and the nature of their legal representation.

However, this model simply gives applicants a choice between two bad options – as the Consultation Paper states, it has the same disadvantages that apply to the current costs framework and the hard cost neutrality model.[42] It does nothing to address existing inequities and disparities in power and resources. It makes applicants heavily reliant on legal advice, and

[41] Consultation Paper at page 30
[42] Consultation Paper at page 30

vulnerable if they do not have such advice, or if they need to seek different legal representation later on. Further, it places the burden of a difficult, complex and technical decision onto the applicant – a burden that the Respect@Work Report focused strongly on trying to reduce and shift onto other parties.

There is no value to applicants in having "greater choice, control and flexibility"[43] if the options they are choosing between are fundamentally flawed, and they bear the burden of having to make that choice, along with the burden of seeking to enforce their rights in the first place.

Further, this model risks creating a two-tiered system of justice, whereby applicants with more financial resources are able to choose a costs follow the event model and recover their legal fees if successful, but applicants with less financial resources need to choose the hard costs neutrality model under which they generally cannot recover their legal fees. The ANU research demonstrates that there is already a socio-economic divide in anti-discrimination litigation, whereby higher income earners are able to get significant damages awards and recoup their costs, but lower income and vulnerable workers are lucky to receive a small amount of damages.[44] Such stratification would only be consolidated by the applicant choice model, entrenching systemic inequality and barriers to access to justice.

Finally, this model is de facto already in place in Australia, as applicants have a choice between state and territory anti-discrimination jurisdictions (where generally a soft costs neutrality model applies), the federal anti-discrimination jurisdictions (where a costs follow the event model applies), and the Fair Work jurisdiction, where a hard costs neutrality model applies to discrimination matters arising under the general protections provisions of the FW Act, and which will also apply to the new FWC sexual harassment jurisdiction. The fact that applicants already have these choices has not translated to them being less deterred from pursuing complaints, or resulted in any increase in court proceedings or litigation - the kinds of outcomes this Inquiry acknowledges are desirable.

Equal access model

As noted in the Consultation Paper, this model is designed to help overcome the many barriers applicants face when bringing discrimination matters. Given the structural inequities, power

[43] Consultation Paper at page 30.
[44] ANU Report at page 78.

disparities and resource differentials involved, this costs model seeks to level the playing field to some degree for applicants.[45]

This model has found significant support by a broad cross section of the sector, including legal academics, legal centres, legal assistance providers, unions, representatives of the legal profession and law firms, who are calling for an equal access model to be implemented. Whilst this support is mentioned in the Consultation Paper,[46] the Paper also states that there is "lack of consensus about the most appropriate model." On the contrary, we believe there is significant support across the sector for the equal access model.

Under this model, the following general principles would apply:

- if an applicant was unsuccessful, each party would bear their own costs, unless the unreasonable conduct of the respondent caused the applicant to incur costs;
- if the applicant was successful, the respondent would be liable for the applicant's costs;
- a court would be prevented from ordering an applicant to pay the respondent's costs except in limited circumstances, such as where the litigation was vexatious, or where their unreasonable conduct in the course of proceedings caused the respondent to incur costs.

The rationale is that where a court has found a respondent has engaged in unlawful conduct in breach of the relevant Act, the respondent should be liable to pay the applicant's costs because respondents should not be excused from paying costs where they have been found by a court to have breached anti-discrimination law. This would provide an additional incentive to not discriminate and an element of punitive action against respondents who have breached the law.

The equal access model has been adopted in different jurisdictions both internationally and domestically. In Australia, there are provisions in three separate pieces of legislation to protect whistleblowers reporting certain unlawful conduct (**the whistleblowing provisions**).[47] Individuals speaking up about discrimination and sexual harassment is highly analogous to the situation of whistleblowers who find themselves to be a threat to an organisation that will try to silence them in order to protect its own reputation, brand and financial viability. The whistleblowing provisions constitute a precedent, are designed to encourage whistle-blowers to come forward, and have not led to any kind of significant increase in spurious or unmeritorious claims.

[45] Consultation Paper at page 28.
[46] Consultation Paper at page 28.
[47] Section 1317 AH of the Corporations Act 2001 (Cth); section s 14ZZZC of the Taxation Administration Act 1953 (Cth); and section 18 of the Public Interest Disclosure Act 2013 (Cth)

One international example is the approach to costs taken in civil rights and discrimination cases in the United States, where the equal access model has been applied in employment discrimination cases since 1978.[48] The US Supreme Court has held that there are at least two strong equitable considerations favouring this approach, being that discrimination law is a law that Congress considered of the highest priority, and when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.[49]

The equal access model is also consistent with the concerns raised in the Respect@Work Report about the negative impact of cost models on access to justice, especially for vulnerable members of the community, and the disadvantages of no costs models for successful applicants.

The Consultation Paper, whilst acknowledging that the equal access model would more effectively overcome the barriers that applicants face in bringing discrimination claims and give applicants much needed certainty,[50] also notes a number of concerns with this model. Firstly, that the "certainty for applicants means increased exposure to the risk of an adverse costs order for respondents, and consequent diminished capacity for respondents to secure legal representation."[51]

Whilst respondents are already exposed to adverse costs orders in cases where applicants are successful, we acknowledge there may be an increased likelihood that respondents face an adverse costs order. However, we believe this is appropriate in circumstances where respondents are found to have engaged in unlawful discrimination. We do not believe it is a just or desirable outcome that under the current costs model, respondents are often not being ordered to pay the costs of successful applicants, or that successful applicants are being ordered to pay the costs of respondents. The equal access model does not impose anything unfair on respondents - it simply ensures that applicants can recoup their costs if they are successful, and that applicants are not deterred from initiating proceedings due to the risk of an adverse costs order against them. Furthermore, if the goal is to increase access to justice and disincentivise discrimination, we should not be uncomfortable with costs being awarded against unsuccessful respondents, and at least no more uncomfortable than we are with damages being awarded.[52]

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[48] Consultation Paper, 21; *Civil Rights Act of 1991,* section 323(3)(e); Christianberg Garment Co v EEOC 434 US 4012 (1978).
[49] Christianberg Garment Co v EEOC 434 US 4012 (1978).
[50] Consultation Paper at page 29.
[51] Consultation Paper at page 29.
[52] Thomas D Rowe, 'The Legal Theory of Attorney Fee Shifting: A Critical Overview' *Duke Law Journal* (1982) 651.. Rowe states that "if equity to a prevailing party through make-whole compensation underlies a particular fee shifting rule, the

We do not believe the equal access model will result in a diminished capacity for respondents to secure legal representation. As outlined above, the ACTU is unaware of any evidence that respondents currently commonly have the benefit of no win no fee or conditional costs arrangements. Rather we believe that in the vast majority of matters, respondents would be required to pay their legal fees as they go. Therefore, this won't result in any significant change in respondents being able to access legal representation. Further, the vast majority of respondents will be organisations rather than individuals. Many of those organisations will have insurance that covers their legal fees, or can offset their legal costs in other ways.

The Consultation Paper also notes that this model may encourage more unmeritorious complaints. Given the protections already in place (whereby the AHRC can terminate such complaints, or courts can strike out proceedings on this basis), as well as the protections built into the equal access model (whereby respondents can recover costs where proceedings are instituted vexatiously or without reasonable cause), we do not believe that this is likely to occur. Further, there is no evidence that the whistleblowing costs provisions have led to an increase in unmeritorious claims.

Finally, the Consultation Paper notes that not all respondents are well resourced corporate entities and would be at a significant disadvantage under this model. The number of cases that involve only individual respondents are very rare, due to the difficulties involved in pursuing an individual. The vast majority of matters involve companies and organisations. If respondents are suffering from financial hardship, it is likely they will be judgment proof and would not be pursued in the Federal Courts in any event. As a general rule, unsuccessful respondents already need to pay costs if they lose a case, so this model is not imposing anything additional on them. Finally, we believe the public interest in reasonable claims being litigated to allow these societal issues to be addressed, and not unreasonably burdening an applicant seeking to litigate such a claim, outweighs any perceived impact on respondents.

Other advantages of the equal access model are that it will encourage more discrimination matters to be pursued in the courts, giving rise to increased judicial consideration and case law that sends the message that such behaviour is unacceptable. It will give applicants greater insight into what kinds of outcomes they can achieve, and may also lead to an increase in damages awards that better reflect community standards. It is also the only model that will ensure the damages awarded to successful applicants are not eaten into by their costs.

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grounds for being troubled by close-case difficulty disappear…a fee award in a close case should create no more discomfort than the rest of a damage award…Once granted make-whole relief, a party should get *full* compensation whether the initial decision seems easy or hard": 670-671.

The equal access model should be adopted in the AHRC Act, as it provides for the most appropriate cost protection in discrimination matters, and is the most closely aligned with the intention and policy objective of Recommendation 25 of the Respect@Work Report. It solves the access to justice problems and the deterrent effect that are inherent to the other costs models. Given that there are so many systemic barriers to applicants bringing claims,[53] this is a significant opportunity to remove one of the largest barriers and thereby improve access to justice for applicants. If the government wanted to ensure that the provisions were working as intended, provision could be made for a review of the legislation within a period such as three years.

Issues for unions

The current costs model is a barrier to unions bringing anti-discrimination claims in the federal courts on behalf of members. Unions have different models of representation, including models where the union takes on the risk of an adverse costs order, and models where it is the individual member that takes on that risk. Whether the risk is borne by the union or the member, it can act as a significant deterrent to pursuing claims in the federal jurisdiction, and means any claim needs to be carefully considered. Our affiliates report that unless there are particular circumstances (such as where the claim is very strong, involves highly egregious conduct, or involves collective or systemic issues), the costs risk means they are usually more likely to lodge proceedings in a state or territory jurisdiction where the risk of adverse costs is far lower.

Some state and territory based anti-discrimination laws are less favourable than their federal counterparts,[54] resulting in a situation where unions and their members may be forced to choose to initiate cases under less favourable legislation due to the costs risk associated with bringing proceedings under federal legislation. This problem has been exacerbated as federal discrimination law has been significantly strengthened, such as the new causes of action in the *Sex Discrimination Act 1984* (Cth) for sex-based discrimination and hostile workplace environments based on sex. These changes should not be undermined by costs provisions which deter applicants from bringing claims under those new provisions.

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[53] Respect@Work Report, page 14.

[54] For example, the NSW *Anti-Discrimination Act 1977* (NSW) contains a cap on damages of $100,000; contains less beneficial provisions regarding disability discrimination than the *Disability Discrimination Act 1992* (Cth); and also does not contain protected attributes that that exist in the *Sex Discrimination Act 1984* (Cth) such as gender identity, intersex status and sexual orientation (rather it only protects discrimination on the grounds of homosexuality or transgender status). Caps on damages are even lower in WA under the *Equal Opportunity Act 1984* (WA) and NT pursuant to the *Anti-Discrimination Regulations 1992* (NT).

The costs risk is substantial. As just one example, one of the ACTU's affiliates is currently running a disability discrimination claim in the Federal Court. The matter has been ongoing for several years. If the union loses this matter and is ordered to pay costs on an indemnity basis, it would need to pay approximately $300,000 in indemnity costs to the respondent, in addition to its own legal costs (counsel fees are estimated to be around $38,000, plus the costs of other disbursements such as filing fees and expert reports). If the union is ordered to pay costs on an ordinary basis, it would need to pay approximately $150,000 in addition to its own costs. The amount of the costs involved, and the risk of an adverse costs order, means that generally speaking, unions simply are unable to run large numbers of these cases.

In proceedings arising under the hard cost neutrality provisions of the FW Act, or under the costs provisions applicable in the state and territory anti-discrimination jurisdictions, unions have the opposite problem. Whilst not exposed to the risk of an adverse costs order (except in very specific circumstances), the fact that unions and members cannot recover their legal costs inevitably limits how many cases they are able to pursue due to the significant costs involved – especially in the Federal Courts.

The ability of unions to run more discrimination and sexual harassment cases on behalf of members could therefore increase if they were able to recover the legal costs associated with the proceedings without being subject to the risk of an adverse costs order. This is also true for the new provisions that allow representative bodies such as unions to make representative applications to court on behalf of people who have experienced unlawful discrimination. If those bodies are able to recover the legal costs associated with the proceedings, they are far more likely to be able to pursue claims.

Wording of the equal access model

For the reasons outlined above, the ACTU believes the equal access costs model is the one that should be adopted. However, careful consideration should be given to the exact wording.

Respondents should be able to recover costs in circumstances where the court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause, thereby providing disincentives to applicants to initiate such actions and protecting respondents from unmeritorious claims.

The Consultation Paper adopts the wording in the whistleblowing provisions, which also provide that parties should be able to recoup costs where the other party has behaved unreasonably. The ACTU has concerns about how broadly such provisions may be interpreted. In particular, we have concerns that the mere refusal of a settlement offer or Calderbank offer could constitute

unreasonable behaviour. There are cases where refusal of such an offer by an applicant has been found to constitute an unreasonable act or omission causing the respondent to incur costs, and thereby resulted in a costs order against the applicant.[55]

Settlement offers are often used and exploited as part of a litigation strategy to ensure that a respondent can recoup its costs and put pressure on applicants to settle,[56] and has little to do with the particular merits or circumstances of the claim. Our affiliates report that this strategy is increasingly being used by respondents, and that the prospect of the refusal of a settlement offer being found to be unreasonable conduct has a chilling effect on workers proceeding with litigation, even where they are seeking important non-monetary outcomes such as declarations, or civil penalties.

Further, in light of the new Respect@Work Guidelines on confidentiality clauses,[57] it is both likely and desirable that increasing numbers of applicants will not want to agree to confidentiality as part of a settlement. The threat of costs for unreasonable conduct in refusing a settlement offer which includes confidentiality should not hang over their heads – this is effectively another way in which applicants could be forced into silence.

Some applicants may also not understand the nature and meaning of Calderbank offers and should not face costs orders because of this. Also, applicants who are not legally represented may be at risk of being considered to act unreasonably if they cause delay in proceedings due to a lack of knowledge and understanding of litigation, without understanding the impact of any such delay on respondents. Finally, it is unclear whether an applicant choosing not to participate in mediation or conciliation would be considered to be unreasonable conduct. However participating in such processes can be very distressing, triggering and re-traumatising for applicants, and pose a risk to their health and safety, especially if an individual respondent who is alleged to have discriminated against or sexually harassed them is also present. In such circumstances it may be appropriate for applicants to either not participate or be able to participate in ways that do not involve them being the same space as the respondent (for example, be in a different room, or on a different telephone line etc). This should not be considered to be unreasonable conduct.

Given the concerns raised above, it is the ACTU's preference that wording regarding unreasonable behaviour is not included. However, if such wording is to be retained in some form, then it needs

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[55] *Adamczak v Alsco Pty Ltd (No 4)* [2019] FCCA 7; *Melbourne Stadiums Ltd v Saunter* (2015) 229 FCR 221 [144]; *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102.

[56] Free and Equal Position Paper at page 194.

[57] Respect@Work Council (December 2022) Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints | Respect@Work (respectatwork.gov.au)

to be considered carefully. It should be made clear that the rejection of a settlement offer by an applicant or lack of participation in a process would not be considered an unreasonable act that could lead to a costs order, and any 'unreasonable conduct' should also be considered in the context of other factors such as whether the person was legally represented.

Potential wording for an equal access costs model to be included in the AHRC Act could be as follows:

1) An applicant who brings a claim under federal discrimination laws will not be liable to pay the costs of a respondent except when:
    (a) The court is satisfised that the applicant instituted the proceedings vexatiously or without reasonable cause; or
    (b) The court is satisfied that the applicant's unreasonable act or omission caused the respondent to incur the costs.
2) The fact that an offer of settlement was made by a respondent and the applicant refused this and loses, or obtains an award less than the offer, does not entitle the respondent to costs.
3) The fact that an applicant does not participate in a process such as conciliation or mediation does not entitle the respondent to costs.
4) Where an applicant is successful, the respondent is liable to pay their costs.
5) Where an applicant is unsuccessful, the respondent will not be liable to pay the costs of an applicant except when the court is satisfied that the respondent's unreasonable act or omission caused the applicant to incur the costs.
6) In determining whether a party has engaged in in an unreasonable act or omission, regard must be had to:
    (a) The financial circumstances of the party;
    (b) The public interest nature of the litigation;
    (c) Whether the party was legally represented when they engaged in the conduct; and;
    (d) any other relevant factor.

Conclusion

The equal access costs model should be adopted. It solves the problems inherent in other costs models by removing the deterrent effect of adverse costs orders and enabling people to access legal representation, without disadvantaging respondents. In doing so, it will encourage more case law and legal precedent in discrimination and sexual harassment matters. In a system which still relies heavily on individuals who have experienced discrimination and harassment bearing the burden of bringing complaints forward, the legal framework should ensure they are

not punished for doing so, and are able to vindicate their rights – both as individuals, and on behalf of society as a whole. This model is the most consistent with the intention and aims of the Respect@Work Report, as rather than entrenching existing inequalities and barriers to justice, it is the model that will most effectively increase access to justice by overcoming some of those barriers, and is crucial to ensuring that Respect@Work is effectively implemented in practice.

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