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Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws

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Glossary

The language used in this paper is set out below.

Adverse cost order	A court order requiring a party to court proceedings to pay the other party's costs in relation to court proceedings.
Applicant	A person (or representative of a person, for example where a representative organisation makes a complaint on behalf of a person or several persons) who has allegedly been discriminated against and is making a complaint to the Australian Human Rights Commission, tribunal or court.
'Applicant choice' cost model	Under this model, at the outset of court proceedings an applicant would be able to elect one of two options as to how costs are resolved. They could choose either a 'costs follow the event' model (whereby the unsuccessful party has costs awarded against them) or a 'hard cost neutrality' model (whereby each party bears their own costs, unless a party acts unreasonably or vexatiously).
'Asymmetrical' or 'equal access' cost model	Under this model, if an applicant is unsuccessful, each party would bear their own costs. However, if an applicant is successful, the respondent would be liable for the applicant's costs.
Civil proceedings	A civil proceeding is any proceedings before a court or tribunal that are not criminal proceedings.
'Cost-capping' order and 'maximum costs' order	A 'cost-capping' or 'maximum costs' order can be made by a court at the start of a matter to limit the costs the applicant is liable to pay the respondent if they are not successful in the proceedings.
Costs follow the event	Used to describe where a court awards costs following the conclusion of proceedings according to the party that was successful. The party that is unsuccessful bears the costs of the other party (in addition to their own costs).
Cost protection models	Legislative provisions that determine how costs are to be awarded in particular cases. See for example 'hard cost neutrality'.
Conciliation	Conciliation in the context of the Australian Human Rights Commission enables the person who made the complaint (the complainant) and the person or organisation being complained about (the respondent) to talk about the issues in the complaint and try to resolve the matter themselves. Conciliation is not like a court hearing.

Court(s)	Most often used to refer to the Federal Court of Australia and the Federal Circuit and Family Court of Australia, given they hear unlawful discrimination matters at the Commonwealth level.
'Hard cost neutrality' model	Under this model, the default position is that each party bears their own costs, except where either party has acted vexatiously or unreasonably. If either party has acted vexatiously or unreasonably, they can be ordered to pay the costs of the other party.
No costs order	An order by a court that parties to a proceeding are to bear their own costs.
Respondent	A person or organisation (or both, for example where a person and a corporate entity as an employer are named as respondents) that has allegedly discriminated against the applicant.
'Soft cost neutrality' model	Under this model, the default position would be that parties bear their own costs, but the court would retain a broader discretion (than under a 'hard cost neutrality' model) to award costs where they consider this would be in the interests of justice, in reference to a number of mandatory (but non-exhaustive) criteria.
Vexatious	A complaint of discrimination that is brought without sufficient grounds for success, purely to cause annoyance to the respondent.
Unmeritorious	A complaint of discrimination that does not have sufficient grounds for success.

Overview

The Respect@Work Report released in 2020 found that sexual harassment is a pervasive and widespread issue in Australian workplaces. It made 55 recommendations addressed to the Government, states and territories, employers and industry groups to prevent and address sexual harassment in Australian workplaces. The recommendations related to five key areas of focus: data and research, primary prevention, workplace prevention and response, support and advocacy, and legal and regulatory reform.

The Fifth National Survey on Sexual Harassment in Australian Workplaces, released on 30 November 2022, found approximately one in five Australians have experienced sexual harassment over the last 12 months, with one in three reporting such an experience over the past five years.¹ 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.²

The Government is committed to completing the implementation of all Respect@Work Report recommendations as a matter of priority. There has been significant progress, including the passage of the Respect at Work Bill 2022, the release of key resources on the Respect@Work website and further funding provided through the 2022-23 October Budget.

In relation to Commonwealth legislative reform, the Respect@Work Report made 13 recommendations,⁵ and all but one of these have now been implemented with the commencement of the following legislation:

- *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*, which commenced on 11 September 2021
- *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*, which commenced on 13 December 2022, and
- *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, which commenced on 7 December 2022.

The remaining recommendation that requires Commonwealth legislative action is recommendation 25, concerning a costs protection provision for discrimination matters that proceed to court. The Respect@Work Report heard that the risk of an adverse cost order acts as a disincentive to applicants considering pursuing their matters under the Sex Discrimination Act in the federal courts. The Australian Human Rights Commission (Commission) expressed its concern that this risk may deter applicants from initiating court proceedings and presents access to justice concerns, particularly for vulnerable members of the community.

While the Respect@Work Report was particularly concerned with the risk of an adverse cost order acting as a deterrent to applicants bringing complaints under the Sex Discrimination Act in the federal courts, the costs model that would be introduced to implement recommendation 25 would apply to all complaints of discrimination under Commonwealth anti-discrimination law, across all protected

¹ Australian Human Rights Commission, *Time for respect: Fifth national survey on sexual harassment in Australian Workplaces* (Report, November 2022) 47 ('*Fifth National Survey*').

² *Ibid.*

attributes and all areas of public life covered by those laws – not just employment-related discrimination complaints, and not just complaints made under the Sex Discrimination Act.

Recommendation 25 of the Respect@Work Report recommended that a costs protection provision, consistent with section 570 of the Fair Work Act (a ‘hard costs neutrality’ model), be introduced to the AHRC Act. However, in its later publication *Free and Equal: A reform agenda for federal discrimination laws* (December 2021), the Commission recommended a different model – a ‘soft costs neutrality’ model, based on a similar model adopted in the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.³

The Respect at Work Bill 2022, introduced to the Parliament on 27 September 2022, originally contained a ‘soft costs neutrality’ model (in Schedule 5 of the Bill).⁴ This part of the Bill was removed while the Bill was before the Senate in response to concerns raised by community legal sector representatives, legal professionals and others. The Government subsequently referred the issue of an appropriate costs model in discrimination proceedings to the Attorney-General’s Department for review. This was in recognition of the concerns raised by stakeholders in relation to the model put forward in the Respect at Work Bill 2022 and the lack of consensus on the most appropriate costs model.

Scope of this consultation process

This paper and associated consultation process are concerned with determining an appropriate costs protection model for Commonwealth anti-discrimination matters that proceed to court.

Discrimination proceedings are civil in nature. An applicant must first make a complaint to the Commission, which must inquire into and attempt to conciliate the complaint, unless the President of the Commission is of the opinion that it should be terminated on one of a number of grounds.

Only where a complaint is terminated, either because there is no reasonable prospect of the matter being resolved by conciliation or for another reason, can the matter proceed to court. Depending on the nature of the termination, applicants may be required to seek leave of the relevant court to proceed with the matter to court, unless the President of the Commission has terminated the complaint on certain grounds.⁵ There are some grounds for termination where leave is not required to proceed to court, including where there is no reasonable prospect of the matter being resolved by conciliation.

The costs model to be implemented at the conclusion of this consultation would apply to discrimination proceedings under Commonwealth law before the court (specifically, the Federal Court of Australia and the Federal Circuit and Family Court of Australia) during judicial consideration of a discrimination matter.

³ Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws* (Report, December 2021) 191 (*‘Free and Equal Paper’*).

⁴ Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) sch 5.

⁵ These grounds are where the President is satisfied that the subject matter of the complaint involved an issue of public importance that should be considered by the court, or that there was no reasonable prospect of the matter being settled by conciliation. See *Australian Human Rights Commission Act 1986* (Cth) s 46PO(3) (*‘AHRC Act’*).

How can you engage with the consultation process?

Individuals and organisations are invited to provide submissions based on the issues covered by this consultation paper through the Attorney-General's Department website at <https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws> by 14 April 2023.

Seeking support

If you or someone you know needs support or advice, you can contact 1800RESPECT for free, national telephone advice. For information and referrals on discrimination issues, you can contact the Australian Human Rights Commission on 1800 656 419 or email infoservice@humanrights.gov.au or visit their website at <https://humanrights.gov.au/complaints/make-complaint>

Why costs reform?

The costs associated with litigation required to assert an individual's rights under discrimination law have long been reported as a disincentive to individuals pursuing such litigation.⁶ These costs-related issues include the risk of an adverse costs order (that is, an order that the applicant pay the respondent's costs, or part of their costs), the costs of the litigation itself and the damages likely to be awarded if an applicant is successful.

There are many other barriers to applicants pursuing litigation, and the risk of costs also exist for a respondent who does not have a choice whether to pursue litigation.

The Commission's Free and Equal paper reiterates that 'the costs that may be incurred in unlawful discrimination proceedings in the federal courts have been identified as a significant deterrent to bringing such proceedings' and catalogues a series of past reviews into the issue.⁷ The paper also notes this is an issue for respondents.⁸

In relation to sexual harassment in particular, the Respect@Work Report heard that the risk of an adverse costs order acts as a disincentive to applicants who are considering pursuing their matters under the Sex Discrimination Act in the federal courts. The report noted the current practice, in which costs generally follow the event (see overview of current framework below), means that applicants may

⁶ *Free and Equal Paper* (n 3) 191; Law Council of Australia, Submission to Attorney-General's Department, *Respect@Work Consultation* (23 March 2022) <<https://www.lawcouncil.asn.au/resources/submissions/consultation-paper-respect-work-options-to-progress-further-legislative-recommendations>>; Maria Nawaz, 'Respect@Work: What's it going to take?' [2021] (77) *Law Society Journal* 68 <<https://search.informit.org/doi/epdf/10.3316/agispt.20210518046901>>; Senate Standing Committee on Legal and Constitutional Affairs, *Report on Human Rights Bill* (Report, 1996) ch 4 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/Pre1999/human/report/c04> ('*Senate Committee Report on Human Rights Bill*').

⁷ *Free and Equal Paper* (n 3) 192.

⁸ *Ibid.*

be liable for the costs of both parties if they are unsuccessful. The Commission expressed its concern that this risk may deter applicants from initiating court proceedings and presents access to justice concerns, particularly for vulnerable members of the community.⁹

This section situates the need for costs reform within a discussion of how the current legal framework for resolving costs in discrimination matters at the federal level operates. It also compares how the anti-discrimination framework operates at the federal level with the state and territory level, given the significant difference in opportunities for applicants to pursue their matter in a no or low-costs jurisdiction.

Overview of current framework

There are currently no specific provisions guiding how costs are awarded in discrimination matters before a federal court. Costs are awarded according to the general discretion of the court, as provided for by relevant provisions in each federal court's statute,¹⁰ which are referred to in notes below subsection 46PO(4) of the AHRC Act. These provisions provide the courts with broad discretion to award costs as they see fit. In the case of the Federal Court of Australia in particular, the relevant provision provides a non-exhaustive list of options for the ways in which the court can award costs, including making an award of costs at any stage in a proceeding whether before, during or after any hearing or trial, and awarding costs in favour of or against a party whether or not the party is successful in the proceeding.¹¹

The Federal Court Rules provide the Court with the power to issue a 'cost-capping' or 'maximum costs' order,¹² which parties can seek from the Court or can be issued proactively by the Court on its own motion.¹³ In determining whether such an order is appropriate, the Court will consider a range of matters, including the consequences of making such an order from the perspective of all parties, the timing of the application, the complexity of the factual or legal issues raised, the amount of damages raised, the nature of the remedies sought, the impact on the parties of making such an order and whether there is a public interest element to the case.¹⁴

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.

⁹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, March 2020) 507 ('*Respect@Work Report*').

¹⁰ See *Federal Court of Australia Act 1976* (Cth) s 43; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 214.

¹¹ *Federal Court of Australia Act 1976* (Cth) s 43(3).

¹² *Federal Court Rules 2011* (Cth) rule 40.51. The Federal Circuit and Family Court of Australia can also make cost-capping orders: see *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) rule 22.03.

¹³ *Federal Court Rules 2011* (Cth) rule 40.51.

¹⁴ See Attorney-General's Department, *Consultation Paper: Respect@Work – Options to progress further legislative recommendations* (Consultation Paper, February 2022) ('*AGD Consultation Paper 2022*').

Issues with the current legal framework

In discrimination proceedings, it is most common for the courts to either make no costs orders or follow the practice of awarding costs ‘after the event’ according to which party was successful.¹⁵ In the case of no costs orders, this means that parties bear their own costs; in the case of awarding costs ‘after the event’, this means that the unsuccessful party, whether the applicant or respondent, is required to pay the costs of the respondent (as well as their own).

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 costs orders are made less frequently against respondents.¹⁶ In relation to sexual harassment proceedings in particular, ANU research has identified that since 2001, applicants have been ordered to pay the respondent’s costs in 56% of cases where the applicant was unsuccessful and sometimes even when the applicant was successful.¹⁷ The ANU observed that since adjudicative proceedings moved to the courts, costs orders at the federal level have increased considerably.¹⁸

Although courts have the power to issue cost-capping orders, which put a limit on the costs that can be recovered, these are rarely made.¹⁹ The courts have been cautious to award costs at an early stage in the proceedings on the basis that parties should be given a reasonable opportunity to get their case in order or otherwise they may be deterred from taking action.²⁰ These orders appear to be limited to cases where the court must determine an issue of public interest, with an impact extending beyond the dispute between the parties in question.²¹

The current framework of broad judicial discretion does not provide applicants and respondents in discrimination matters at the federal level with sufficient certainty as to how costs will be awarded. The risk of an adverse costs order is significant for parties and operates as a clear disincentive to pursuing litigation. In the absence of clear legislative provision to provide this certainty, neither the judiciary nor the legal profession (responsible for representing applicants) are using the existing discretion in a way that would overcome this uncertainty and disincentive. The costs risk associated with litigation therefore continues to represent a significant barrier to applicants, as found by the Respect@Work

¹⁵ Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation* (Report, 25 March 2022) 14 (*‘ANU Damages and Costs Report’*).

¹⁶ *Ibid* 39.

¹⁷ *Ibid* 34-38.

¹⁸ *Ibid* 42.

¹⁹ See Attorney-General’s Department (n ; Law Council of Australia (n 6).

²⁰ See *AGD Consultation Paper 2022* (n 14).

²¹ See *AGD Consultation Paper 2022* (n 14).

Report in relation to sexual harassment matters in particular,²² and by other reports in relation to discrimination matters more generally.²³ As Heerey J indicated in *Fetherston v Peninsula Health (No 2)*:²⁴

While the Disability Discrimination Act is without doubt beneficial legislation, its characterisation as such does not mean that this Court is to apply any different approach as to costs. In conferring jurisdiction under a particular statute Parliament may conclude that policy considerations warrant a special provision as to costs, for example that there be no order as to costs or that costs only be awarded in certain circumstances, such as, for example, where a proceeding has been instituted vexatiously or without reasonable cause: *Workplace Relations Act 1996* (Cth) s 347. The absence of any such provision applicable to the present case confirms that the usual principles as to costs are to apply.²⁵

Exacerbating the costs risk that applicants face in bringing discrimination proceedings to court is the risk that any damages they are awarded if they are successful may not be significant enough to cover their own legal costs in the absence of an adverse costs order. The intersection between costs and damages is discussed later in this paper.

Further contributing to the uncertainty applicants face is the small number of cases that actually proceed to court, resulting in low levels of jurisprudence and arguably judicial expertise and specialisation in this area of law. As the Free and Equal paper outlines, this means less certainty for applicants as to their prospects for success and therefore less appetite to risk the costs involved.²⁶

These issues have led to the adoption of specific costs protection models in other areas of legislative regulation, such as workplace relations (the Fair Work Act) and whistleblower protection (the Public Interest Disclosure Act and Corporations Act).

In further recognition of these issues, the Victorian Civil and Administrative Tribunal has ruled that costs orders should not be made lightly in the human rights jurisdiction so as not to deter applicants from bringing complaints before the Tribunal.²⁷

In this context, legislating for a specific costs model applicable to discrimination proceedings would be a significant reform. It would provide certainty to all parties to discrimination matters at the outset of any matter as to how costs will be awarded with the aim of increasing access to justice.

²² *Respect@Work Report* (n 9) 507.

²³ See for example, Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report, 2004) 58, 136, 368-369 <<https://www.pc.gov.au/inquiries/completed/disability-discrimination/report>>; Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Report, 2008) 72-73, 84-85 and 156 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/sex_discrim/report/index>; *Free and Equal Paper* (n 3) 191-194.

²⁴ [2004] FCA 594.

²⁵ *Ibid* [9].

²⁶ *Free and Equal Paper* (n 3) 191.

²⁷ *Tan v Xenos* [2008] VCAT 1273 (Judge Harbison VP).

Comparison of federal and state and territory jurisdictions

There is an important difference between the federal and state and territory level in relation to resolving discrimination matters.

At the state and territory level, once a discrimination complaint has been made to the relevant human rights or equal opportunity body without successful resolution, it proceeds to a tribunal or board (such as the Victorian Human Rights and Equal Opportunity Commission, the NSW Anti-Discrimination Board or the Western Australian Equal Opportunity Commission). This is an intermediate adjudicative stage available to resolve the matter before it proceeds to court, designed to keep costs minimal.

At the federal level, there is no intermediate low-cost stage. Matters proceed from the Commission to the courts, where the complexity of the litigation process and consequently costs increase.²⁸ The lack of a no costs jurisdiction at the federal level exacerbates the need for costs reform to provide certainty for parties to discrimination matters before embarking on what is often a high cost, high risk process.

Across the majority of states and territories, the costs model adopted for tribunals to apply at the intermediate stage is soft costs neutrality – whereby the default position is that parties bear their own costs, but the tribunal retains discretion to award costs otherwise where it considers this appropriate (often in reference to a list of prescribed factors – exhaustive or non-exhaustive). This model is discussed in further detail later in the paper.

The human rights and anti-discrimination context

Overview

At the federal level, discrimination complaints are made to the Commission. The Commission is a ‘no costs’ conciliation jurisdiction. This means that applicants and respondents do not need legal representation to be involved in conciliation (though they may wish to arrange for this, noting the AHRC Act permits them to be represented with the consent of the person presiding over the conciliation).²⁹

Conciliation is an informal complaint resolution process that gives the complainant and respondent the opportunity to attempt to resolve the matter with the help of an impartial conciliator. The Commission does not perform the role of a court, and does not have the power to award costs at the conclusion of conciliation.

The grounds upon which complaints of discrimination can be made to the Commission are contained in five key Acts:

- the Age Discrimination Act
- the AHRC Act³⁰

²⁸ The previous Human Rights and Equal Opportunity Commission, which predated the Commission, could hear and determine matters in a similar way to the state or territory tribunals: see *Free and Equal Paper* (n 3) 41-42.

²⁹ *AHRC Act* (n 5) s 46PK.

³⁰ Note that discrimination complaints under the AHRC Act cannot proceed to the federal courts for determination (they may result in a report to the Minister).

- the Disability Discrimination Act
- the Racial Discrimination Act, and
- the Sex Discrimination Act.

The costs protection model would apply to all Commonwealth anti-discrimination laws – not just the Sex Discrimination Act, and not just those relating to sexual or sex-based harassment in the workplace.

It is therefore important to consider how the model would operate across the breadth of matters pursued under these laws, which prohibit discrimination on a range of grounds and in a range of areas of public life including education, goods, services and facilities, accommodation and clubs. In addition, a significant proportion of complaints made to the Commission are intersectional in nature, meaning they raise issues across a number of protected grounds under Commonwealth discrimination law (often across multiple Acts). The Commission advises that this is particularly prevalent in the area of employment. For example, a complaint may allege that both sex and racial discrimination occurred as part of an employment decision to dismiss someone from their job.

As many advocates have reported, very few discrimination complaints proceed to court for a range of reasons, many associated with known barriers to accessing justice, including awareness of rights, awareness of avenues for exercising rights, access to legal representation, costs involved in conciliation and litigation both financial and otherwise, and these can push applicants to settle privately outside of court. In addition, many matters are conciliated successfully before the Commission.

The Respect at Work Act 2022 introduced new provisions into the AHRC Act to enable representative bodies to make representative applications to court (subsequent to making representative complaints to the Commission) on behalf of people who have experienced unlawful discrimination. While the impact of those provisions is not yet known, the ability of representative bodies to bring representative complaints to court creates a new pathway for complaints of unlawful discrimination to proceed to court, avoiding some of these barriers to applicants' access to justice.

The way that costs are awarded in a discrimination matter is one aspect of procedural discretion amidst the broader context of taking legal action, which includes the other barriers applicants face and awards of damages (see further discussion later in this paper).

Recent research conducted by the ANU has demonstrated that the number of cases proceeding to court for all types of discrimination at the federal level are declining.³¹ Of the complaints made to the Commission and proceeding to the courts, disability discrimination represents the overwhelming majority of matters.

The information below about the types of matters that have come before the Commission and the courts provides some insight into the proportion of complaints made under Commonwealth discrimination laws and the types of respondents involved.

³¹ ANU *Damages and Costs Report* (n 15) 27.

Complaints before the Commission

The majority of complaints to the Commission each year are made under the Disability Discrimination Act. In 2021-22 for example, 52 per cent of complaints made to the Commission were made under the Disability Discrimination Act (noting this was higher than usual due to COVID-related complaints).³² In 2020-21 the proportion of complaints made under the Disability Discrimination Act was 37 per cent and in 2019-20, 44 per cent.

Table 10: Complaints received by Act over the past five years³³

	2017-18		2018-19		2019-20		2020-21		2021-22	
Disability Discrimination Act	869	42%	891	44%	1006	44%	1,163	37%	1,960	52%
Sex Discrimination Act	552	27%	520	26%	479	21%	504	16%	597	16%
Racial Discrimination Act	290	14%	332	16%	403	17%	523	17%	464	12%
Age Discrimination Act	172	8%	137	7%	168	7%	191	6%	217	6%
AHRC Act ³⁴	163	8%	157	8%	251	11%	732	24%	498	13%
Total³⁵	2,046	100%	2,037	100%	2,307	100%	3,113	100%	3,736	100%

In terms of the kind of respondents that are named as part of the complaints made to the Commission (some of which then proceed to court), the majority of these are private enterprises ranging in size from fewer than 5 employees through to more than 500 employees.

The second highest proportion of respondents are Commonwealth government agencies, followed by state and territory government agencies. The complaints against these respondents are most typically in the area of employment, then goods, services and facilities, education and finally accommodation.

³² Australian Human Rights Commission, *2021-22 Complaint statistics* (Publication, 2022) <https://humanrights.gov.au/sites/default/files/ahrc_ar_2021-2022_complaint_stats_0.pdf>.

³³ Table extracted from Australian Human Rights Commission, *2021-22 Complaint statistics* (Publication, 2022) 12 <https://humanrights.gov.au/sites/default/files/ahrc_ar_2021-2022_complaint_stats_0.pdf>.

³⁴ Note, that complaints made under the AHRC Act cannot proceed to the federal courts.

³⁵ Note, the percentages have been rounded to the nearest whole number. As such, not all percentage totals add to exactly 100.

The following list provides an overview of the types of respondents to complaints made to the Commission, giving a sense of the breadth of entities and individuals that are involved:

- education providers: including state education departments, individual school principals, tertiary institutions, private and religious schools, individual teachers
- health providers: including medical centres, individual doctors, nurses and other health professionals, chemists, private and public hospitals
- retail: including supermarkets, food outlets (such as bakeries), beauty salons and building equipment providers
- hospitality: including cafes (often small owner-operated businesses), restaurants, hotels, clubs
- financial and insurance services
- accommodation providers: including caravan parks, motels, hotels and short-term rental companies
- transport providers: including state government providers, private bus companies, taxi and ride share services, and
- airlines.

The Commission advised that individuals are commonly named as respondents to discrimination complaints concerning education-based discrimination, sexual harassment, racial hatred, victimisation and disability discrimination in employment complaints, but less so in sex discrimination complaints. For example, in discrimination complaints made under the Disability Discrimination Act in the area of employment, individual staff or managers who are responsible for relaying organisational positions about employment decisions are often named as individual respondents in circumstances where a similar complaint under the Sex Discrimination Act would only allow the 'employer' (that is, the organisation) to be named as the respondent.³⁶

In terms of applicants who seek legal advice or representation as part of making a complaint to the Commission, the Commission has advised that complaints under the Sex Discrimination Act in the area of employment are the most heavily legally represented of all complaints. For example, in the 2021-22 reporting period, approximately 65 per cent of sexual harassment in employment complaints had legal representation at some point. This compares with legal representation being engaged in 27% of complaints overall.

Complaints that proceed to court

As noted above, only a very small number (on average 2-4 per cent) of finalised complaints are the subject of an application to proceed to court.³⁷

³⁶ See section 14 of the Sex Discrimination Act, which prohibits 'employers' from engaging in discrimination in an employment context, compared to section 15 of the Disability Discrimination Act, for example, which prohibits discrimination by an employer or a person acting or purporting to act on behalf of an employer.

³⁷ See for example *Free and Equal Paper* (n 3) 103.

In relation to sexual harassment specifically, the Fourth National Survey found that 2 per cent of sexual harassment complaints were reported as resolved in court (based on survey participants' answers), and the Fifth National Survey found that 3 per cent were reported as resolved in court.³⁸ The Respect@Work Report and recent ANU research indicates that of the individuals that do make a formal complaint of sexual harassment (noting many do not), only a small number pursue court proceedings, and most sexual harassment cases are settled privately outside of court proceedings.³⁹

At the federal level, complaints made under the Disability Discrimination Act make up the largest number of matters proceeding to court,⁴⁰ consistent with being the majority of the complaints made to the Commission.

Research conducted by the ANU has identified a total of 1,979 cases that were brought under discrimination laws across Australia (Commonwealth, state and territory) between 1984 and 2021 relating to all federally-protected attributes. The following provides a breakdown of the numbers of cases by complaint type at the federal level:

Disability discrimination	313
Sexual harassment	193
Sex discrimination (excluding sexual harassment)	182
Race discrimination ⁴¹	143
Age discrimination	7
Total	838

³⁸ Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (Report, September 2018) 71 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/everyones-business-fourth-national-survey-sexual>>; *Fifth National Survey* (n 1) 139.

³⁹ *Respect@Work Report* (n 9) 414; *ANU Damage and Costs Report* (n 15) 18; Beth Gaze, 'Damages for Discrimination – Compensating denial of a human right' [2013] (116) *Precedent (Australian Lawyers Alliance)* 20, 22.

⁴⁰ See *ANU Damages and Costs Report* (n 15) 23.

⁴¹ Note, while the *Racial Discrimination Act 1975* (Cth) commenced in 1975, the ANU research only collected case data from 1984.

How costs are dealt with in other jurisdictions

A number of cost protection models exist across Australia at the state and territory level as well as in other Commonwealth legislative frameworks.

Australia

The models relevant to discrimination matters in Australia at the federal level and the states and territories are summarised in the table below. Further detail on the current framework at the federal level is provided above and a description of the different costs model types is provided further below.

As set out in the table below, the majority of Australian states and territories have a soft costs neutrality model for dealing with costs in discrimination matters before tribunals. Under this model, the default position is that parties bear their own costs, but the court or tribunal retains discretion to award costs otherwise, often in accordance with a list of guiding factors.

JURISDICTION	MODEL	DESCRIPTION	RELEVANT LEGISLATION
Commonwealth	Broad discretion	Federal courts have a broad discretion to make orders 'as they think fit', and generally follow the practice of awarding costs after the event according to who was successful.	<i>Australian Human Rights Commission Act 1986 (Cth) s 46PO; Federal Court of Australia Act 1976 s 43; Federal Circuit and Family Court of Australia Act 2021 s 214.</i>
Australian Capital Territory	Hybrid of hard costs neutrality and asymmetrical	The general rule is that each party bears their own costs. If the tribunal decides in favour of the applicant, the tribunal may order the other party to pay the applicant's filing fee and any other fee 'necessary for the application'. If the tribunal considers that a party caused unreasonable delay or obstruction during the application, the tribunal may order that party to pay the reasonable costs of the other party arising from that delay or obstruction.	<i>ACT Civil and Administrative Tribunal Act 2008 (ACT) s 48.</i>
New South Wales	Soft costs neutrality	The general rule is that each party bears their own costs. However, the Tribunal may award costs 'only if it is satisfied that there are special circumstances warranting an award of costs.' In determining whether there are 'special circumstances', the tribunal <i>may</i> have regard to various factors, including: <ul style="list-style-type: none"> • whether a party's conduct unnecessarily disadvantaged another party; • whether a party unreasonably prolonged the proceedings; • the relative strengths of the parties' claims; • the nature and complexity of proceedings; • whether the proceedings were frivolous, vexatious or lacking in substance. 	<i>Civil and Administrative Tribunal Act 2013 (NSW) s 60.</i>
Northern Territory	Soft costs neutrality	The general rule is that each party bears their own costs. However, the tribunal may make a costs order. Before making a costs order, the tribunal <i>must</i> take into account various factors, including:	<i>Northern Territory Civil and Administrative Tribunal Act 2014 (NT) s 131-132.</i>

		<ul style="list-style-type: none"> the tribunal’s objectives of simplifying proceedings and keeping costs to parties to a minimum; the need to ensure that proceedings are fair and that parties are not disadvantaged by proceedings that have little or no merit. 	
Queensland	Soft costs neutrality	<p>The general rule is that each party bears their own costs.</p> <p>However, the tribunal may make a costs order ‘if the tribunal considers the interests of justice require it to make the order.’ In determining whether to make a costs order, the tribunal <i>may</i> have regard to various factors, including:</p> <ul style="list-style-type: none"> whether a party’s conduct unnecessarily disadvantaged another party; the nature and complexity of the proceeding; the relative strengths of the parties’ claims; the financial circumstances of the parties to the proceeding. <p>In some proceedings, the tribunal may award ‘all reasonable’ costs if a party has refused a settlement offer by the other party, and the tribunal is of the opinion that its decision is not more favourable to the party than the offer.</p>	<i>Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 100, 102.</i>
South Australia	Soft costs neutrality	<p>The general rule is that each party bears their own costs.</p> <p>However, the tribunal may make a costs order if it ‘thinks that it is appropriate to do so after taking into account’ various factors, including:</p> <ul style="list-style-type: none"> the tribunal’s objectives of simplifying proceedings and keeping costs to parties to a minimum; the need to ensure that proceedings are fair and that parties are not disadvantaged by proceedings that have little or no merit. 	<i>South Australian Civil and Administrative Tribunal Act 2013 (SA) s 57.</i>

Tasmania	Hybrid hard/soft costs neutrality	<p>The general rule is that each party bears their own costs.</p> <p>The tribunal may make a costs award if it considers it appropriate to do so after taking into account various factors, including:</p> <ul style="list-style-type: none"> • the tribunal’s objectives of simplifying proceedings and keeping costs to parties to a minimum; • the need to ensure that proceedings are fair and that parties are not disadvantaged by proceedings that have little or no merit. <p>The Tribunal cannot make an order against a party for any expenses or loss resulting from any proceedings or matter unless:</p> <ul style="list-style-type: none"> • the party brought or conducted the proceedings frivolously or vexatiously; or • any prescribed circumstance exist. <p>If the Tribunal dismisses or strikes out any proceedings, the Tribunal should make a costs order against the party against whom the action is directed, unless there is a good reason for not making such order.</p>	<i>Tasmanian Civil and Administrative Tribunal Act 2020 (Tas) s 120-121.</i>
Victoria	Soft costs neutrality	<p>The general rule is that each party bears their own costs.</p> <p>The tribunal may make a costs order ‘only if it is satisfied that it is fair to do so, having regard to’ various factors, including:</p> <ul style="list-style-type: none"> • whether a party’s conduct unnecessarily disadvantaged another party; • whether a party has been responsible for unreasonably prolonging the proceedings; • the relative strengths of the parties’ claims; • the nature and complexity of the proceedings. 	<i>Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 109.</i>
Western Australia	Soft costs neutrality	<p>The general rule is that each party bears their own costs.</p> <p>However, the tribunal may make a costs order.</p>	<i>State Administrative Tribunal Act 2004 (WA) s 87.</i>

International

In New Zealand, the Human Rights Tribunal hears claims relating to breaches of the New Zealand *Human Rights Act 1993*, which includes discrimination claims. The Tribunal has broad discretion to award costs as it sees fit, and has discretion to consider a range of factors about parties' conduct as part of the proceedings before the Tribunal in making a costs order.⁴²

Despite its broad discretion, the Tribunal generally awards costs according to which party is successful.⁴³ Where the applicant is successful in part, the Tribunal typically awards costs in favour of the applicant (with the respondent having to pay their costs) or does not make a costs order. Where the applicant's claim has been found to be vexatious or without foundation, the Tribunal generally awards costs in favour of the respondent (with the applicant having to pay their costs).

In the United Kingdom (UK), the default approach to awarding costs in civil matters is that costs follow the event according to which party is successful. However, the courts retain discretion to make a different costs order in accordance with a non-exhaustive list of factors including parties' conduct, parties' success and any offers to settle.

Employment-related matters in the UK are heard by the Employment Tribunal. The default approach to awarding costs is that each party bears their own legal costs. The Tribunal may only award costs against a party if that party has acted 'vexatiously, abusively, disruptively or otherwise unreasonably'⁴⁴ or if their claim had 'no reasonable prospect of success'.⁴⁵ Unlike in the civil courts, costs orders are generally the exception as opposed to the rule in matters brought before the Tribunal.

In the United States (US), various departmental bodies and agencies oversee and manage discrimination matters, based on the specific sector the complaint originates in (i.e. employment, education, housing etc.). The Equal Employment Opportunity Commission (EEOC), for example, deals with employment-related discrimination matters. It has an asymmetrical model, under which a successful applicant is presumptively entitled to costs unless special circumstances render such an award unjust.⁴⁶ Chapter 11 of the EEOC's *Management Directive 110* provides that 'special circumstances' is to be construed narrowly.⁴⁷ If the respondent is successful, however, costs orders may only be made against the applicant if the application was 'frivolous, unreasonable, or without foundation'.⁴⁸

⁴² *Human Rights Act 1993* (NZ) s 92L.

⁴³ 'Human Rights Review Tribunal', *Ministry of Justice* (Web Page, December 2022) <<https://www.justice.govt.nz/tribunals/human-rights/costs-awarded/>>.

⁴⁴ *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* (UK) rule 76(1)(a).

⁴⁵ *Ibid* rule 76(1)(b).

⁴⁶ *Labor*, 29 CFR § 1614.501(e)(1)(i); *New York Gaslight Club Inc v Carey*, 447 US 54 (1983).

⁴⁷ US Equal Employment Opportunity Commission, *Management Directive 110* (August 2015) ch 11 <<https://www.eeoc.gov/federal-sector/management-directive/chapter-11-remedies>>.

⁴⁸ *Christiansburg Garment Co v EEOC*, 434 US 412 (1978).

Options for reform

This paper considers several options for costs models to be introduced to the AHRC Act, including:

- the option originally recommended by the Respect@Work Report, which is a model based on section 570 of the Fair Work Act ('hard cost neutrality')
- the option put forward in the Respect at Work Bill 2022 ('soft cost neutrality')
- an asymmetrical cost model, and
- a hybrid or applicant opt-in model.

These models would all involve reform to the status quo, given the current model is posing significant issues to applicants seeking to enforce their rights to be free from discrimination, and failing to deliver certainty to both applicants and respondents to discrimination proceedings, impacting their access to justice.

While this paper analyses four models, this is not an exhaustive consideration of all possible options. Stakeholders are invited to consider if there are other models, or a combination of models, that may address the current issue of costs operating as a barrier to people pursuing unlawful discrimination matters in the courts.

The costs models discussed in this paper are assessed according to the following kinds of considerations, which are overlapping concerns that have been highlighted by the Respect@Work Report, as well as other publications that have analysed costs in discrimination matters:⁴⁹

- their ability to deliver certainty and fairness for both applicants and respondents to discrimination proceedings
- any impact they might have on the ability of parties to secure legal representation
- whether they would inappropriately encourage unmeritorious complaints
- whether they would inappropriately encourage litigation strategies designed to negatively impact the other party
- their ability to overcome applicants' reluctance to proceed with discrimination matters to court overall.

As the discussion below indicates, there is no model that balances these considerations perfectly, given they are often competing in nature and vary according to the particular circumstances of a case. For example, while it is regularly noted by advocates and experts that applicants face an uneven playing field in trying to enforce their individual rights under discrimination law against a large, well-resourced corporate entity (often their employer or a service provider), it is not universally the case that the respondent to a complaint is well-resourced or at an advantage. The costs model implemented for discrimination matters needs to take account of the variety of circumstances and matters that come before the court.

⁴⁹ Such as the *Free and Equal Paper* (n 3).

In relation to the concern about vexatious or unmeritorious complaints proceeding to court, it is important to note the statutory grounds for dealing with such complaints, relevant to both the Commission and the federal courts.

When the President of the Commission has received a discrimination complaint and is considering whether to investigate and conciliate it, or terminate it, they *must* terminate it if they are satisfied that:

- the complaint is trivial, vexatious, misconceived or lacking in substance,⁵⁰ or
- there would be no reasonable prospect that the court would be satisfied the complaint amounts to unlawful discrimination.⁵¹

The President also has a *discretion* to terminate complaints that they consider do not amount to unlawful discrimination (among several other discretionary grounds to terminate).

However, just because the President of the Commission terminates the complaint on these grounds does not mean the applicant cannot proceed to court.

At the stage where an applicant is considering whether to proceed to court with their complaint, they must seek leave of the court to do so unless the President of the Commission has terminated the complaint on the following specific grounds:

- the subject matter of the complaint involved an issue of public importance that should be considered by the court, or
- there was no reasonable prospect of the matter being settled by conciliation.⁵²

In addition, the federal courts have their own statutory grounds to deal with vexatious proceedings.⁵³

While these statutory grounds provide both the Commission and the court with mechanisms to manage vexatious and unmeritorious matters, the threshold for what is considered ‘vexatious’ is generally quite high. This means matters can proceed to court and incur costs even where they have been terminated by the President of the Commission on the grounds that they are vexatious or unmeritorious.

Fair Work Act section 570 model (‘hard cost neutrality’)

Overview

The model in section 570 of the Fair Work Act is often termed 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, except where either party has acted vexatiously or unreasonably (see the specific grounds extracted below). If either party has acted vexatiously or unreasonably, they can be ordered to pay the costs of the other party.

⁵⁰ *AHRC Act* (n 5) s 46PH(1B)(a).

⁵¹ *Ibid* s 46PH(1C).

⁵² *Ibid* s 46PO(3).

⁵³ See *Federal Court of Australia Act 1976* (Cth) pt VAAA; *Federal Circuit and Family Court of Australia Act 2021* (Cth) pt 8.

The only grounds for the court to exercise discretion under this model are where a party has acted vexatiously or unreasonably compared with the broader list of (non-exhaustive) factors in the 'soft costs neutrality' model discussed below.

The specific circumstances in which the court considering a matter under the Fair Work Act can award costs against a party according to section 570 are where:

- the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
- the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
- the court is satisfied of both of the following:
 - the party unreasonably refused to participate in a matter before the Fair Work Commission;
 - the matter arose from the same facts as the proceedings.⁵⁴

A costs model for discrimination matters based on section 570 of the Fair Work Act could use similar criteria, including whether a party has refused to participate in conciliation before the Commission. It could draw from the existing threshold in the AHRC Act that refers to complaints being 'trivial, vexatious, misconceived or lacking in substance'.

A full extract of section 570 of the Fair Work Act is in the appendix to this paper ('relevant legislative provisions').

Analysis of advantages and disadvantages

For an applicant, this model means that they will only be liable for their own costs and have considerable certainty around this as the default position. The exceptions to this are where the applicant acts vexatiously or unreasonably, in which case they could be liable for the respondent's costs as well. Where the respondent acts vexatiously, the applicant may have their costs paid by the respondent. This position, and relative certainty, persists regardless of whether an applicant is successful or not.

The position under this model would be similarly certain for a respondent.

In addition to providing individual applicants with greater certainty, this model may encourage more public interest pro bono litigation, with representative organisations having certainty that they will not face an adverse costs order (unless they have acted vexatiously or unreasonably).

While there are clear advantages to the certainty provided by this model, there are also some obvious disadvantages. Legal representatives for applicants involved in discrimination proceedings are unlikely to be able to recoup their costs unless their client is successful and damages are awarded that exceed their costs. Legal representatives for respondents are also very unlikely to be able to recoup their costs. As has been argued elsewhere, including in relation to the soft cost neutrality model originally contained

⁵⁴ *Fair Work Act 2009* (Cth) s 570(2).

in the Respect at Work Bill 2022, this is likely to create issues for applicants (and respondents) securing legal representation, including by deterring legal representatives from acting on a ‘no-win, no-fee’ basis.

In relation to sexual harassment matters in particular, the ANU research paper indicates that ‘[legal] practitioners also expressed concern that if costs are not available, it will not be financially viable for no-win, no-fee legal practices to act for sexual harassment complaints, given the high-risk of costs exceeding damages’.⁵⁵

This model may increase the risk of unmeritorious discrimination complaints that are not vexatious, but nonetheless lack substance (and have even been found by the Commission to lack substance), proceeding to court. Even where such matters are unsuccessful before court, respondents will generally be required to bear their own costs.

This model may also be vulnerable to well-resourced litigants engaging in delay tactics, incurring increasing costs in order to limit the other party’s ability to continue with the proceedings (assuming these tactics do not amount to vexatious or unreasonable conduct).⁵⁶ This could disadvantage applicants with meritorious claims, as well as respondents facing unmeritorious claims.

Overall, this model may continue to deter applicants (particularly those who are not well-resourced) from proceeding to court with their matter, unless they are being provided legal assistance or supported on a purely pro bono basis.

Cost neutrality with discretion model (‘soft cost neutrality’)

Overview

This was the model recommended by the Commission in its Free and Equal paper and the model that was originally included in the Respect at Work Bill 2022. It is also similar to the model put forward in the Human Rights and Anti-Discrimination Bill 2012, and to the approach to costs that is applicable in most state and territory tribunals that hear anti-discrimination matters under state and territory discrimination legislation.⁵⁷

Under this model, the default position would be that parties bear their own costs, but the court would retain a broader discretion to award costs where they consider this would be in the interests of justice, in reference to a number of mandatory (but non-exhaustive) criteria. The criteria to be considered by a court under this model would be broader than the conduct of the parties to proceedings and the merits of a given matter, and could include considerations such as the financial circumstances of the parties, the outcome of the proceedings and the public importance of the matter being litigated.

The broader scope under this model for the court to exercise its discretion to deviate from the default costs neutrality position, under which parties bear their own costs, is the key difference between this model and the ‘hard cost neutrality’ model.

⁵⁵ ANU Damages and Costs Report (n 15) 15.

⁵⁶ Ibid 102-3.

⁵⁷ For example, see *Civil and Administrative Tribunal Act 2013 (No 2)* (NSW) s 60.

The criteria adopted by the Respect at Work Bill 2022 were:

- the financial circumstances of each of the parties to the proceedings
- the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)
- whether any party to the proceedings has been wholly unsuccessful in the proceedings
- whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle:
 - the proceedings; or
 - the matter the subject of the terminated complaint;and, if so, the terms of the offer
- whether the subject matter of the proceedings involves an issue of public importance;
- any other matters that the court considers relevant.

The role of the criteria under this cost 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), as well as broader considerations around access to justice, fairness and litigation procedure generally. Giving the courts this broad discretion, while pointing to criteria that should be central to their consideration, enables the court to balance and weigh competing interests before deciding how costs should be awarded.

These criteria could be expanded upon or changed, should this model be selected for inclusion in the AHRC Act. For example, the *Civil and Administrative Tribunal Act 2013* (NSW), directs the NSW Civil and Administrative Tribunal to consider various ‘special circumstances’, including:

- the nature and complexity of proceedings;
- whether a party has been responsible for unreasonably prolonging or delaying the time taken to complete the proceedings;
- whether a party conducted proceedings in a way that unnecessarily disadvantaged another party to the proceedings; and
- whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance.⁵⁸

In various other jurisdictions, the Tribunal (or Commission) is required to consider:

- the need to ensure that proceedings are fair and that parties are not disadvantaged by proceedings that have little to no merit;⁵⁹

⁵⁸ *Civil and Administrative Tribunal Act 2013* (NSW) s 60(2).

⁵⁹ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 57(2)(b).

- the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,⁶⁰ and
- whether the party has participated in good faith, particularly in the process of information gathering by the Tribunal (or Commission).⁶¹

Analysis of advantages and disadvantages

This model could provide a level of certainty to both applicants and respondents in relation to the costs they would be required to pay as part of court proceedings, but less certainty than a hard cost neutrality model, given the broader judicial discretion involved. This model falls somewhere between a hard cost neutrality and asymmetrical cost model (see below) – it provides greater discretion for the court to consider relevant matters that might make it more just to award costs in favour of the applicant in certain circumstances, such as where the applicant has fewer financial resources than the respondent, where there is an imbalance of power between the parties and where the matter concerns an issue of public importance. But the broader discretion involved reduces the certainty for both parties.

In recommending this model, the Commission indicated:

The Commission’s position remains that for the small proportion of matters which proceed to court, 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.⁶²

As the Explanatory Memorandum to the Respect at Work Bill 2022 explained, the government considered this model addressed the concerns raised in the Respect@Work Report, without disadvantaging either successful applicants from recovering their costs or respondents who are not well-resourced from paying their own costs as the default position, even when successful (as would be the case under an asymmetrical cost model).⁶³

However, this model would have similar disadvantages in relation to the ability of parties to secure legal representation as the hard cost neutrality model has, which was a key concern raised by legal representatives in particular in the context of the Respect at Work Bill 2022.⁶⁴

This model would pose less of a risk than the hard cost neutrality model in terms of encouraging litigation strategies designed to frustrate the ability for a party to continue with court proceedings, as a result of the broader judicial discretion to depart from the default position that parties bear their own costs. However, this risk will remain under any form of cost neutrality model.

⁶⁰ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(3)(c).

⁶¹ *Human Rights Act 1993* (NZ) s 92L(2)(a).

⁶² *Free and Equal Paper* (n 3) 201.

⁶³ Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) 87

<https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6916>.

⁶⁴ These concerns have been raised in the past – see the *Free and Equal Paper* (n 3) 200, for example.

Overall, the Free and Equal paper found that this model would be more advantageous in key respects than a hard costs neutrality model as there would be more scope for applicants to recover their costs with the broader judicial discretion regardless of the outcome (and for respondents, in appropriate circumstances), but consequently more risk that they would face an adverse cost order (but still less of a risk when compared to the status quo).⁶⁵ It would still present disadvantages in terms of parties' ability to secure legal representation when compared to the status quo, but with more scope to recover costs, this would be less of a risk under this model compared with a hard costs neutrality model.

It is important to note that community legal sector representatives and advocates have argued that a 'soft cost neutrality' model would not go far enough to overcome the deterrent effect that an adverse costs order poses to applicants seeking to commence proceedings in discrimination law matters, nor provide sufficient certainty to applicants as to how costs would be awarded.⁶⁶ While these advocates would ultimately prefer an asymmetrical model, in general they prefer a hard cost neutrality model (based on section 570 of the Fair Work Act) over a soft cost neutrality model.

Asymmetrical cost model ('equal access')

Overview

This type of cost model – also referred to as an equal access cost model – would prevent a court from ordering an applicant to pay the respondent's costs *except* where the applicant had acted vexatiously or unreasonably in commencing the proceedings or in the way they conducted themselves during proceedings. This model is supported by a range of community legal sector representatives and legal profession representatives, as well as academics.

It is based on existing federal laws providing whistleblower protections: see section 18 of the *Public Interest Disclosure Act 2013* and section 1317AH of the *Corporations Act 2001* (extracted in full in an appendix to this paper).

Under this model, if an applicant is unsuccessful, each party would bear their own costs. However, if an applicant is successful, the respondent would be liable for the applicant's costs. Respondents have very limited capacity to recover their own costs under this model, even where they are successful.

Given this model is weighted more in favour of applicants and overcoming barriers to them proceeding to court with discrimination matters, it is referred to as an 'asymmetrical cost model' – though as advocates have pointed out, individual applicants seeking to enforce their rights in discrimination law often face significant challenges (including power disparities), and so some term this model an 'equal access cost model', as it seeks to level the playing field for applicants.

⁶⁵ *Free and Equal Paper* (n 3) 199-201.

⁶⁶ See UNSW Kingsford Legal Centre, *Open Letter on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (Letter, October 2022) <<https://rlc.org.au/news-and-media/news/open-letter-respect-work-law-reform-bill-does-not-go-far-enough>>.

Analysis of advantages and disadvantages

An asymmetrical cost model would more effectively overcome the barriers that applicants face in proceeding to court with their discrimination matters by mitigating the risk of an adverse cost order almost entirely. Under this model, applicants would be sure that should they be unsuccessful, they would only be liable for their costs – not also the respondent’s (unless the applicant had acted vexatiously or unreasonably).

However, this 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.

Under this model, applicants would be able to recoup their costs where they are successful (given costs would be awarded against the respondent), so legal practitioners would not be discouraged from offering representation on a conditional cost basis. If the applicant is unsuccessful, they would only be liable for their own costs (unless they were found to have acted vexatiously or unreasonably).

However, a respondent would not be able to recover their legal fees even if successful. This may impact legal practitioners’ ability to offer services on a conditional cost basis, as it means that respondents would need to be certain they could cover their own costs before commencing litigation (and this may consequently increase the pressure on respondents to settle privately prior to litigation commencing). This may not be a significant risk for well-resourced respondents, but would pose a challenge for smaller respondents, such as small hospitality or retail businesses, accommodation providers or individual teachers and principals (see the outline of respondent categories above).

This model may encourage more discrimination matters of public interest and value to be brought before the courts for judicial consideration, given applicants would face less financial risk and disincentive from doing so. Conversely, this model may encourage more unmeritorious complaints, given the financial risk and disincentive would shift primarily to respondents. And while this may be appropriate in some cases, where respondents are well-resourced corporate entities and at significant power disparity over an applicant, many respondents do not fit this profile and would be at a significant disadvantage under this model.

Applicant choice model

Overview

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 reflected in the 1997 report of the Senate Legal and Constitutional Affairs Committee on the Human Rights Legislation Amendment Bill 1996 and reiterated in the Commission’s Free and Equal position paper.⁶⁷

⁶⁷ *Senate Committee Report on Human Rights Bill* (n 6) para 4.42; *Free and Equal Paper* (n 3) 195.

Analysis of advantages and disadvantages

This model would empower applicants to control how costs are settled and provide them with a measure of flexibility based on their circumstances. An applicant choice model could accommodate a range of circumstances that might be relevant to a particular applicant in a particular matter, particularly their financial situation and the nature of their legal representation (for example, 'no win no fee' or pro bono). Applicants would be able to weigh the relative advantages and disadvantages of both available models and make a choice that best suits them.

While both options ('costs follow the event' or 'hard cost neutrality') treat applicants and respondents equally, the respondent would have to accept the model chosen by the applicant.

This model would have the same advantages and disadvantages outlined above in relation to the status quo and hard cost neutrality model – but it would give greater choice, control and flexibility to applicants.

Intersection between costs and damages

There is a clear relationship between the way costs and damages are awarded by courts in discrimination matters. If the quantum of damages awarded in a given case is low, as it historically has been in discrimination matters,⁶⁸ it may not cover a successful applicant's own legal costs, let alone adequately compensate them.

The Respect@Work Report recommended that the Government conduct further research on damages in sexual harassment matters and whether they reflect contemporary understandings of the nature, drivers, harms and impacts of sexual harassment (recommendation 24). The Government commissioned research into these issues, which was conducted by the ANU. The ANU's research found that at the federal level, damages for sexual harassment matters have steadily increased, particularly in the last decade. However, this increase has not been reflected in the other types of discrimination prohibited at the federal level: damages awards for sex, race, age and disability are far lower than those typically awarded for sexual harassment and have not seen large increases over time.⁶⁹

The ANU research also found that when compared with damages awarded in defamation law, awards of damages in sexual harassment matters pale in comparison: federally, the average award for non-economic loss for defamation was \$239,856, nearly four times higher than the average award in the same five-year period for sexual harassment.⁷⁰

These trends are relevant to determining an appropriate cost model for discrimination matters at the federal level. For example, if a hard cost neutrality model is elected and a successful applicant had to bear their own costs, this may nullify their damages award. Under a soft cost neutrality model, a criterion could be included directing courts to consider the award of damages in a particular case, so as to factor this into any costs order. Of note, in *Shiels v James*⁹⁶ Raphael FM held that the amount of the

⁶⁸ ANU Damages and Costs Paper (n 15) 16; Respect@Work Report (n 9) 506.

⁶⁹ ANU Damages and Costs Paper (n 15) 42.

⁷⁰ Ibid 49.

applicant's damages award would be totally extinguished if no order for costs was made in their favour, and so in those circumstances, costs should follow the event.⁷¹

Non-legislative considerations

As highlighted above, although the federal courts have a broad discretion provided for by their conferring legislation in relation to awarding costs and the power to issue cost-capping orders,⁷² it is evident that the current model is not working effectively to create certainty for parties.

The Respect@Work Report found that judicial decision-making can be inconsistent in reflecting a nuanced understanding of sexual harassment and its impacts. The Report also emphasised the judiciary's integral role in ensuring that persons harassed are not retraumatised by engaging in judicial processes.

Further to this, the ANU research demonstrates that there is a lack of specific judicial expertise with respect to discrimination matters, including matters concerning sexual harassment, given the low numbers of cases that proceed to court. While there is significant variability across jurisdictions, judges tend to be conservative rather than innovative with respect to decision-making (including in relation to awards of costs and damages) and as a result of this the outcomes in discrimination matters are out of step with prevailing community expectations.⁷³ The research ultimately observed that consideration should be given to developing further specialist materials for judicial officers including a bench book for discrimination matters.

Recommendation 40 of the Respect@Work Report encourages judicial officers and tribunal members to undertake education and training to enhance their understanding of best practice regarding the adoption of sensitive, trauma-informed and gender responsive approaches to handling matters involving sexual harassment, as well as in relation to sexual harassment within their workplace.

The Government funded the Australian Human Rights Commission to develop a suite of training and education materials to enhance the judiciary's understanding of the nature, drivers and impacts of workplace sexual harassment in response to recommendation 40.

The Australian Human Rights Commission consulted judicial experts such as the National Judicial College of Australia and Australasian Institute of Judicial Administration in addition to representatives from courts across Australia in developing the package of materials, which have been finalised and will be made available on the National Judicial College of Australia's education portal shortly. The materials include a series of factsheets, case studies, resources for face to-face training and an e-learning course.

The department is also exploring other education and training initiatives to support greater judicial expertise in discrimination matters which will be informed by the ANU research and Respect@Work Report. This may include the Commission undertaking work to monitor awards of damages in

⁷¹ *Federal Discrimination Law – Chapter Eight – Costs Awards* (Australian Human Rights Commission, 2011) 15.

⁷² See *Federal Court of Australia Act 1976* (Cth) s 43; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 214.

⁷³ *ANU Damages and Costs Report* (n 15) 86.

discrimination matters across Australia for the purpose of informing the consideration of whether future law reform is required, and the development of further training and education materials.

Abbreviations

Age Discrimination Act	<i>Age Discrimination Act 2004 (Cth)</i>
AHRC Act	<i>Australian Human Rights Commission Act 1986 (Cth)</i>
ANU research report	Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study
Commission	Australian Human Rights Commission
Corporations Act	<i>Corporations Act 2001</i>
Court(s)	Most often used to refer to the Federal Court of Australia and the Federal Circuit and Family Court of Australia.
Disability Discrimination Act	<i>Disability Discrimination Act 2004 (Cth)</i>
Fair Work Act	<i>Fair Work Act 2009 (Cth)</i>
Fifth National Survey	Time for respect: Fifth national survey on sexual harassment in Australian workplaces
Fourth National Survey	Everyone’s business: Fourth national survey on sexual harassment in Australian workplaces (2018)
Free and Equal Paper	Free and equal: An Australian conversation on human rights Issues Paper 2021
Public Interest Disclosure Act	<i>Public Interest Disclosure Act 2013 (Cth)</i>
Racial Discrimination Act	<i>Racial Discrimination Act 1975 (Cth)</i>
Respect at Work Act 2022	<i>Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022</i>
Respect at Work Bill 2022	Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022
Respect@Work Report	Respect@Work: Sexual Harassment National Inquiry Report (2020)
Sex Discrimination Act	<i>Sex Discrimination Act 1984 (Cth)</i>

Appendix – relevant legislative provisions

Fair Work Act 2009 (Cth)

570 Costs only if proceedings instituted vexatiously etc.

- (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.

- (2) The party may be ordered to pay the costs only if:
 - (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
 - (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
 - (c) the court is satisfied of both of the following:
 - (i) the party unreasonably refused to participate in a matter before the FWC;
 - (ii) the matter arose from the same facts as the proceedings.

Public Interest Disclosure Act 2013 (Cth)

18 Costs only if proceedings instituted vexatiously etc.

- (1) In proceedings (including an appeal) in a court in relation to a matter arising under section 14, 15 or 16, the applicant for an order under that section must not be ordered by the court to pay costs incurred by another party to the proceedings, except in accordance with subsection (2).
- (2) The applicant may be ordered to pay the costs only if:
 - (a) the court is satisfied 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 other party to incur the costs.

Corporations Act 2001 (Cth)

1317AH Costs only if proceedings instituted vexatiously etc.

- (1) This section applies to a proceeding (including an appeal) in a court in relation to a matter arising under section 1317AE in which a person (the *claimant*) is seeking an order under subsection 1317AE(1).
- (2) The claimant must not be ordered by the court to pay costs incurred by another party to the proceedings, except in accordance with subsection (3) of this section.

- (3) The claimant may be ordered to pay the costs only if:
 - (a) the court is satisfied that the claimant instituted the proceedings vexatiously or without reasonable cause; or
 - (b) the court is satisfied that the claimant's unreasonable act or omission caused the other party to incur the costs.

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth)

(Note: this provision was removed prior to the Bill's passage)

(To be inserted into the *Australian Human Rights Commission Act 1986*)

46PSA Costs

- (1) Subject to subsection (2), in proceedings under this Division against a respondent to a terminated complaint, each party is to bear that party's own costs.
 - (2) If the court concerned considers that there are circumstances that justify it in doing so, the court may make such order as to costs, whether by way of interlocutory order or otherwise, as the court considers just.
 - (3) In considering whether there are circumstances justifying the making of an order under subsection (2), the court concerned must have regard to the following matters:
 - (a) the financial circumstances of each of the parties to the proceedings;
 - (b) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission);
 - (c) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
 - (d) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle:
 - (i) the proceedings; or
 - (ii) the matter the subject of the terminated complaint;and, if so, the terms of the offer;
 - (e) whether the subject matter of the proceedings involves an issue of public importance;
 - (f) any other matters that the court considers relevant.
- Note: Section 37N of the *Federal Court of Australia Act 1976* and section 191 of the *Federal Circuit and Family Court of Australia Act 2021* also provide for matters to be taken into account in awarding costs.
- (4) In the case of a representative application, subsection (2) does not authorise the court concerned to award costs against a person on whose behalf the application is made other than the person who made the application.

Civil and Administrative Tribunal Act 2013 (No 2) (NSW)

60 Costs

- (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
- (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
- (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—
 - (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
 - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
 - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
 - (d) the nature and complexity of the proceedings,
 - (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
 - (f) whether a party has refused or failed to comply with the duty imposed by section 36(3),
 - (g) any other matter that the Tribunal considers relevant.
- (4) If costs are to be awarded by the Tribunal, the Tribunal may—
 - (a) determine by whom and to what extent costs are to be paid, and
 - (b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*) or on any other basis.
- (5) In this section—

costs includes—

 - (a) the costs of, or incidental to, proceedings in the Tribunal, and
 - (b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

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