Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

Senate Legal and Constitutional Affairs Legislation Committee

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The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au.](http://www.lawcouncil.au)

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- The Law Society of New South Wales
- The Law Institute of Victoria
- The Queensland Law Society
- The Law Society of South Australia
- The Law Society of Western Australia
- The Australian Capital Territory Law Society

Executive Summary

1. The Law Council is pleased to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) (**Costs Protection Bill**).

2. The Costs Protection Bill is intended to protect applicants in anti-discrimination court proceedings from adverse costs orders when they are unsuccessful. An adverse costs order can have serious financial consequences for unsuccessful applicants who have to pay their own legal costs and the respondents' costs. In the context of sexual harassment proceedings, the risk of an adverse costs order may discourage an applicant commencing a court proceeding.[1]

3. The Australian Human Rights Commission's (**AHRC**'s) *Respect@Work Report* recommended, with respect to sexual harassment in the workplace, that the AHRC Act be amended to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth) (**FW Act**). Under this provision, applicants and respondents generally bear their own costs. A 'no-costs' or 'cost neutral' jurisdiction of this type is also reflected in several state and territory anti-discrimination regimes.[2]

4. Consultations by both the Law Council and the Attorney-General's Department have shown little support for a no-costs model to be adopted under federal anti-discrimination law, largely due to the predicted effect it would have on parties' ability to secure legal representation.

5. As a result, the Costs Protection Bill proposes to implement an alternative 'equal-access' model across all federal anti-discrimination laws[3] generally (not only sexual harassment matters), which would protect applicants (but not respondents) from adverse costs orders in most circumstances (including where an applicant's claim is dismissed).

6. The Law Council is aware of, and sympathetic to, arguments raised by proponents of the equal-access model, including that applicants are often in a vulnerable position compared with respondents in sexual harassment claims,[4] and that the spectre of adverse costs orders can deter the pursuit of legitimate claims.[5]

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[1] See Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Report, 2022).

[2] See *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48; *Civil and Administrative Tribunal Act 2013* (NSW) s 60; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 131-132; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100, 102; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 57; *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 120-121; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109; *State Administrative Tribunal Act 2004* (WA) s 87.

[3] *Racial Discrimination Act* 1975 (Cth), *Sex Discrimination Act* 1984 (Cth), *Disability Discrimination Act* 1992 (Cth) and *Age Discrimination Act* 2004 (Cth), through the procedural provisions of the *Australian Human Rights Commission Act* 1986 (Cth).

[4] See eg Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *UNSW Law Journal* 699.

[5] See eg Power to Prevent Coalition Joint Statement, 14 April 2023 – *Time for equal access in discrimination claims:* <https://www.legalaid.vic.gov.au/time-equal-access-discrimination-claims>.

7. Nevertheless, after extensive consultations, and recognising that there is a range of views amongst the legal profession, on balance, the Law Council does not support the measures in the Costs Protection Bill.[6]

8. No-costs provisions are relatively common in other discrimination jurisdictions, both in Australia and overseas. However, the equal-access model reflected in the Costs Protection Bill departs even further from the generally applicable common law presumption that costs 'follow the event' and is substantially without precedent.[7] Its implementation in matters brought under federal discrimination law could interfere with the courts' discretion to award costs in the interests of justice, as well as with the efficient management (including settlement) of such cases.

9. The Law Council is concerned that the Costs Protection Bill tilts the balance overly in favour of the applicant and moves the financial risk and disincentive for unmeritorious claims to the respondents. Notwithstanding the Bill's provisions regarding vexatious or unreasonable proceedings, this may result in large numbers of applicants bringing unmeritorious and protracted litigation without sufficient incentives to ensure efficiency within the justice system. In this context, the Law Council is concerned that the Costs Protection Bill reduces incentives for the parties to engage genuinely with the AHRC's conciliation processes and, later, in any alternative dispute processes available in the courts and settlement negotiations. It could also render offers of compromise and Calderbank offers ineffective.

10. As well as its potential ramifications for the effective conduct of litigation and pre-trial settlement, this may impact respondents, including individuals, small business operators, charities and schools. Under the Costs Protection Bill, these respondents may find themselves unable to be recompensed for their costs, even where they successfully defend a claim. It may disincentivise respondents from being legally represented in proceedings, to reduce their overall risk and exposure to costs. It may encourage applications for costs to be sought against third parties or litigation funders.[8] The Law Council is concerned that the Costs Protection Bill does not fully grapple with the rationale of a costs order generally following the event, which is to compensate the person in whose favour it is made without having a punitive effect.[9]

11. As drafted, the Costs Protection Bill may have arbitrary and unintended consequences. For instance, a respondent's ability to be recompensed where they are successful may depend, in an assessment of their power advantage over the applicant, on factors outside of their control, such as whether their industry or workplace is hierarchical.

12. The Law Council is also concerned that the equal-access model as proposed in the Costs Protection Bill was not recommended by the AHRC, either in its *Respect@Work* or *Free and Equal* reports.[10] If the Costs Protection Bill is passed,

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[6] The Law Council, in its formal position on Commonwealth Anti-Discrimination law reform published in 2011 (<https://lawcouncil.au/resources/policies-and-guidelines/policy-statement-consolidation-of-commonwealth-anti-discrimination-laws>), supported a no-costs model. That position is now under review.
[7] See further Lack of precedent below.
[8] Costs orders may be made against a non-party involve circumstances in which the non-party has effective control of the litigation: see for example *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 (litigation funder*), Collins and the Victorian Legal Aid Commission* (1984) FLC ¶91-508 (Legal Aid). Consider also *Kiefel v State of Victoria* [2014] FCA 604 and *Walker v State of Victoria* [2012] FCAFC 38 at [114] with respect to a litigation guardian for an applicant with disability.
[9] *Northern Territory v Sangare* [2019] HCA 25; (2019) 265 CLR 164 at [25].
[10] AHRC, *Free and Equal: A reform agenda for federal anti-discrimination laws (2021)*: <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>.

there is potential for the model's expansion to other areas of law that are also beneficial or remedial in nature, and in which disparities of power between parties are common. This may exacerbate the potential ramifications described above.

13. After careful consultation across the profession, the Law Council proposes that Parliament, if it is minded to pursue legislative reform in this area, may wish to consider an alternative position, described as a 'broad-discretion' model.[11]

14. Under the broad-discretion model, costs awards against either unsuccessful applicants or respondents (who are not always more powerful or better resourced) would only be made after consideration of a range of pertinent factors, including the relative financial circumstances of the parties, their conduct (including in relation to any settlement offers) and the relief under section 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) including damages to be awarded. The parties would be able to make submissions on these matters, enabling the court to conduct a fair balancing process. A more detailed description of the broad-discretion model, including all relevant factors to be taken into consideration by the court, is set out below.

15. The Law Council considers that such a model would address the intent behind Recommendation 25 of the 2020 AHRC's *Respect@Work* Report.[12] It would give applicants in federal sexual harassment claims the option of litigation under discrimination law (with increased fairness in relation to potential costs orders), or (as a result of amendments to the FW Act in December 2021) a right to seek redress under Part 3-5A of the FW Act with respect to sexual harassment (if the claim is work-related and the applicant opts for the relative certainty of a 'no-costs' jurisdiction).[13]

16. The Law Council also notes that the risk of adverse costs orders is only part of a large, complex picture when it comes to the effectiveness of Commonwealth discrimination law in protecting victims of sexual harassment and discrimination. Stronger roles for relevant non-court institutions, increased availability of legal aid and judicial education are also important in this regard.[14] It will also be important to monitor the combined effect of the many recent reforms that have followed the *Respect@Work* report, in terms of whether their objective of eliminating workplace sexual harassment is met over time.

17. Should Parliament be minded, despite the Law Council's position, to pursue the Costs Protection Bill, this submission makes a number of recommendations to improve the Bill's provisions.

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[11] Not to be confused with the current federal costs model, which is described as 'broad-discretion' in the Attorney-General's Department's *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* (February 2023), 18.

[12] AHRC, *Respect@Work: Sexual Harassment National Inquiry Report (2020)*: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

[13] A similar choice in the Queensland jurisdiction was discussed, and recommended to be maintained, in the Queensland Human Rights Commission's recent review of the *Anti-Discrimination Act 1991* (Qld) – see QHRC, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991,* July 2022, p 182 and recommendation 11.4.

[14] See Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *UNSW Law Journal* 699.

Context

Australian Human Rights Commission Recommendations

18. In preparing its *Respect@Work* Report, regarding workplace sexual harassment, the AHRC acknowledged the concerns raised in submissions regarding the risk of costs orders acting as a disincentive to pursuing sexual harassment matters in the federal courts. To address this, the Report recommended (Recommendation 25) that the AHRC Act be amended by the insertion of a provision consistent with section 570 of the FW Act, which authorises a court to order that a party pay another's costs only if satisfied that the party 'instituted the proceedings vexatiously or without reasonable cause', or that their 'unreasonable act or omission caused the other party to incur costs'.

19. In its 2021 Report *Free and Equal: A reform agenda for federal discrimination laws* (***Free and Equal* Report**), concerning the reform of federal discrimination laws generally, the AHRC revised its position to support a scheme that would have expanded the court's discretion to order costs 'in the interests of justice', having regard to several mandatory factors. The default position would remain that each party bear its own costs.[15]

20. As part of a reform package in response to the *Respect@Work* Report, the *Anti-Discrimination Legislation Amendment (Respect at Work) Bill* 2022 (Cth) initially contained amendments relating to costs orders in discrimination cases, consistent with the position taken by the AHRC in its *Free and Equal* Report. However, this Schedule was removed from the version of the bill ultimately enacted by Parliament.

21. The Costs Protection Bill—the subject of the present inquiry—ostensibly implements Recommendation 25, which is the last outstanding recommendation of the *Respect@Work* report.[16] However, as discussed below, it does not do so in the manner recommended by the AHRC—either in its *Respect@Work* report or in its *Free and Equal* report.

Current costs regime

22. Since 13 April 2000, when claims arising under federal discrimination law began to be heard in the Federal Court of Australia[17] and the then Federal Magistrates Court,[18] the costs regime for general civil litigation has applied to such matters.

23. The federal courts have a broad discretion to order costs according to their establishing legislation.[19] However, by reference to the applicable court rules and

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[15] AHRC, *Free and Equal: A reform agenda for federal anti-discrimination laws (2021)*: <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>, 201.
[16] See Costs Protection Bill, *Explanatory Memorandum*, 3.
[17] See *Human Rights Legislation Amendment Act No. 1 1999* (Cth) (passed by Parliament on 23 September 1999) (HRLA Act). See submission of Anti-Discrimination Law Experts Group (ADLEG) to the present inquiry, 13 December 2023, Appendix 1.
[18] See Sch 16 of the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth) which commenced on 13 April 2000 and inserted references to the Federal Magistrates Court into the HREOC Act (as amended by the HRLA Act) wherever references to the Federal Court appeared.
[19] *Federal Court of Australia Act 1976* (Cth), s 43(2); *Federal Circuit and Family Court of Australia Act 2021* (Cth), s 214(3).

practice notes, costs generally 'follow the event'—that is, the unsuccessful party pays the costs of the successful party.[20]

24. Underlying both the general rule that costs follow the event, and the qualifications to it, is the idea that costs should be paid in a way that is fair, having regard to the responsibility of each party for the incurring of the costs. The purpose of a costs order is to compensate the person in whose favour it is made, not to punish the person against whom the order is made. Costs orders also play an essential role in case management.[21]

25. These points are reflected in the Federal Court's Costs Practice Note, which sets out that the Court will consider the appropriateness of making a special cost order in circumstances that may warrant it, including where parties have failed to comply with their pre-litigation genuine steps obligations, where the 'overarching purpose duty' has not been met, where parties engage in an abuse of process, raise unmeritorious arguments before the Court or otherwise conduct themselves inappropriately in the litigation.[22]

26. In general, the financial resources available to a party will not be relevant in making a costs order.[23]

27. It is largely accepted for federal discrimination matters that the Federal Circuit and Family Court of Australia (**FCFCOA**) will usually apply the principle that costs follow the event and the unsuccessful party will be required to pay the successful party's costs.[24]

28. However, the courts have departed from this principle on occasion in such matters, for example, where there is a significant public interest element to the case,[25] the unsuccessful party is unrepresented,[26] or the successful party conducts proceedings in an unnecessarily prolonged manner.[27]

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[20] See *Federal Court of Australia Act 1976* (Cth), s 43; *Federal Court Rules 2011* (Cth), Part 40; FCA *Costs Practice Note*: https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-costs>; *Federal Circuit and Family Court of Australia Act 2021* (Cth), s 214; *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth), Part 22; FCFCOA, *Legal costs in general federal law matters:* <https://www.fcfcoa.gov.au/gfl/pubs/gfl-costs>.

[21] Judicial Commission of New South Wales, Civil Trials Bench Book – Costs, [8-000]; FCA *Costs Practice Note*: https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-costs>, 3.13; For example Rule 40.08 *Federal Court Rules 2011* (Cth) relevantly provides that a party may apply to the Court for an order that any costs and disbursements payable to another party in the proceeding be reduced by an amount to be specified by the Court if the applicant has claimed a money sum or damages and has been awarded a sum of less than $100,000; or the proceeding (including a cross-claim) could more suitably have been brought in another court or tribunal.

[22] FCA *Costs Practice Note*: https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-costs>, 3.13.

[23] See eg *Northern Territory v Sangare* [2019] HCA 25; (2019) 265 CLR 164 at [25].

[24] Eg, *Fetherson v Peninsula Health* (No 2) (2004) 137 FCR 262 at [8], [9] per Heerey J and *Hollingdale v North Coast Area Health Service (No. 2)* [2006] FMCA 585, [11]. The general approach is explained further in the AHRC's *Federal Discrimination Law 2016:* <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> Eg, *Fetherson v Peninsula Health* (No 2) (2004) 137 FCR 262 at [8], [9] per Heerey J. The general approach is explained further in the AHRC's *Federal Discrimination Law 2016:* <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>>, Chapter 8.

[25] Eg, *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306; *Jacomb v Australian Municipal, Administrative, Clerical and Services Union* [2004] FCA 1600.

[26] Eg, *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433

[27] Eg, *Horman v Distribution Group Ltd* [2001] FMCAfam 52 (affirmed on appeal *Horman v Distribution Group Ltd* [2002] FCA 219.

29. There are concerns that in practice the courts depart from this principle far too infrequently in sexual harassment and discrimination matters (see below).

30. The FCFCOA is designed to be a lower-cost jurisdiction, and indeed has special staged rules limiting the party-party costs available in most matters.[28] The costs of litigation in this court may still be significant, but more limited and predictable than in the Federal Court.[29]

31. In the Law Council's view, greater consideration could be given to the distinctions between the FCFCOA and the Federal Court and their implications for applicants in the current context.

32. In both of these courts, cost capping orders are available to limit parties' financial exposure.[30] However, the Law Council's consultations suggest these orders are underutilised, costly to make and can sometimes be difficult to obtain. Changes to encourage better use of these orders might be useful as an associated reform (applicable to federal litigation under beneficial legislation more broadly, rather than just discrimination cases). Practitioners advise that there are presently no other specific provisions guiding how costs should be awarded in discrimination matters in the federal courts.

33. It should be borne in mind that, unlike most other proceedings commenced in the federal courts, applicants in discrimination cases must make a complaint to the AHRC in relation to the alleged unlawful discrimination. The complaint must subsequently have been terminated by the President of the AHRC. The rationale behind this process is that it is usually preferable to all parties for them to resolve complaints of this kind quickly, cheaply and privately. Under the AHRC Act, there is no cost for lodging a complaint. When a complaint is investigated and conciliated by the AHRC, the parties bear their own costs.[31] The AHRC has no power to award costs with respect to any of its relevant functions under Part IIB, Division 1 ('Conciliation by the President'), including those complaints the President must terminate because the complaint is trivial, vexatious, misconceived or lacking in substance.[32]

34. The AHRC reported for the year 2021–22 that it received 3736 discrimination complaints. It conducted approximately 1819 conciliation processes, of which 1128 complaints (62 per cent) were successfully resolved.[33]

35. Even when proceedings are commenced in the Court, it is common for the Court to refer the parties to participate in a mediation with a Court registrar. While the Court statistics do not record the success rate of Court mediations brought under the AHRC Act, the Law Council understands from the practitioners who frequently appear in these matters, that there is a high degree of success through the Court mediation process. The fact that relatively few cases proceed to trial in part may

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[28] FCFCOA, *Legal costs in general federal law matters*: <https://www.fcfcoa.gov.au/gfl/pubs/gfl-costs>. see for example the approach taken in *Noble v Baldwin & Anor* (No.2) [2011] FMCA 700.
[29] Attachment A details further prescriptions in the FCFCOA Rules, including 22.11 Expenses for attendance by witness; 22.12 Expenses for preparation of report by expert; 22.13 Solicitor as advocate; 22.14 Advocacy certificates and 22.15 Counsel as advocate.
[30] See FCA, *Legal Costs*: <https://www.fedcourt.gov.au/going-to-court/i-am-a-party/court-processes/legal-costs>; *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth), r 22.03 and Schedule 2 Costs.
[31] See AHRC, *Complaints*: <https://humanrights.gov.au/complaints>.
[32] See section 46PH(1B)(a) of the AHRC Act.
[33] Australian Human Rights Commission, 2021-22 Complaint statistics: <https://humanrights.gov.au/sites/default/files/ahrc_ar_2021-2022_complaint_stats_0.pdf> 2-3.

reflect the success of the Court-assisted mediations, and may not be solely due to the risk of adverse costs orders.

36. **Attachment A** sets out more detail regarding current legislative arrangements and relevant costs provisions and procedure.

AGD-commissioned research

37. Amongst its recommendations, the AHRC *Respect@Work* Report recommended that the Australian Government conduct further research in damages in sexual harassment matters and whether this reflects contemporary understandings of the nature, drivers, harms and impacts of sexual harassment. This was intended to inform judicial education and training.[34]

38. The Attorney-General's Department subsequently engaged Emerita Professor Margaret Thornton, Mr Kieran Pender and Madeleine Castles to conduct the recommended research.[35] This research was appropriately focused on sexual harassment and, while aspects canvassed discrimination matters, its findings may be considered to be limited in their broader application. Further research across the federal discrimination law system would, in the Law Council's view, be valuable.

39. An overview of the research paper, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* is included at **Attachment A**. The paper notes that, since 2001, when the federal scheme evolved to the current arrangements, of federal sexual harassment matters that resulted in a final decision:

- 35 per cent of cases resulted in no-costs orders being made;
- in matters where the applicant was successful, the respondent had been ordered to pay a successful applicant's costs 67 per cent of the time, no-costs were ordered in 23 per cent of cases and costs awarded against the applicant in 10 per cent of cases; and
- in matters where the applicant was unsuccessful, the applicant had been ordered to pay the respondent's costs 56 per cent of the time and the respondent had never been ordered to pay the applicant's costs.

40. The research paper was less specific with respect to discrimination matters generally, as relevant findings were not tracked against the outcome of the matter.

41. It reported practitioners' views that, from an applicant's perspective, costs risk is the major barrier to pursuing a sexual harassment complaint. The views of parties themselves were not canvassed.

42. Noting that the research paper was only published in late 2022, the Law Council is unclear as to how it has since been used to inform judicial education and training. There has been no reference to the research paper in any Court decisions and there appears to be little awareness of the research paper among legal practitioners. The Law Council anticipates that it is too early to determine its effectiveness in this regard, including how it translates to the exercise of judicial discretion about costs in federal sexual harassment matters.

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[34] In addition to Recommendation 25 canvassed above.

[35] AGD, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (2022), < https://www.ag.gov.au/rights-and-protections/publications/damages-and-costs-sexual-harassment-litigation-doctrinal-qualitative-and-quantitative-study>.

The Costs Protection Bill

Overview

43. The Costs Protection Bill is based on an 'equal-access' model, under which generally:

- respondents who are unsuccessful must pay applicants' costs; and
- regardless of the outcome, applicants are protected from adverse costs orders in most circumstances.

44. The Costs Protection Bill modifies a 'pure' equal-access model, under which applicants would be protected from adverse costs orders except where their claims are vexatious or their conduct unreasonable.[36] The modifications in question take into account that not all respondents to discrimination claims will have a significant advantage over the applicant in terms of resources or power (for example, being in a position to affect the applicant's employment).

Liability of respondent

45. The Costs Protection Bill provides that, if the applicant is successful in proceedings on one or more grounds, the court must order each respondent against whom the applicant is successful to pay the applicant's costs. This will presumably apply to all interlocutory proceedings, including applications seeking the court's permission to commence a proceeding under section 46PO(3A) because a complaint may have been terminated as out of time, trivial, vexatious, misconceived or lacking in substance, or successful summary dismissal applications. It also raises the utility of respondents seeking any security for costs orders.

46. However, the court will not be required to order the respondent to pay the costs incurred if it satisfied that those costs relate to an unreasonable act or omission by the applicant that caused them to incur the relevant costs.[37]

Liability of applicant

47. The Costs Protection Bill provides that an applicant must not be ordered by the court to pay costs incurred by another party to the proceedings *unless*:

- the court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause; or
- the court is satisfied that the applicant's unreasonable act or omission caused the other party to incur the costs; or
- all of the following apply in relation to the respondent:
    - they were successful in the proceedings; and
    - do not have a significant power advantage over the applicant; and
    - do not have significant financial or other resources relative to those of the applicant.[38]

[36] See AGD *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* (February 2023), 28.
[37] Costs Protection Bill, Schedule 1, clause 3, proposed ss 46PSA (2)-(4).
[38] Ibid, proposed ss 46PSA(5)-(6).

48. These latter stipulations, captured in proposed paragraphs 46PSA(6)(c)(i)–(iii), are aimed at addressing a significant issue with the equal-access model—that is, potential unfairness to respondents who have no particular advantage over the applicant. This is discussed further below.

Law Council response

49. The Attorney-General's Department (**AGD**) Consultation Paper on this issue of February 2023 stated in relation to equal access:[39]

> *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.*

50. The Law Council is aware of, and sympathetic to, arguments raised by commentators and proponents of the equal-access model, including that applicants are often in a vulnerable position compared with respondents in sexual harassment claims,[40] and that the spectre of adverse costs orders can deter the pursuit of legitimate claims.[41]

51. As noted, the Law Council has received a range of views regarding the Costs Protection Bill. There are members of the legal profession who strongly support its provisions on the above grounds. In their view, the Costs Protection Bill would have the effect of enabling many more people to access discrimination law and bring legitimate claims to court, increasing their access to justice and jurisprudence in this area. It may also increase the pool of expertise of practitioners in the area, ensuring that they are paid appropriately for their work (noting however, that applicants may not always be represented, as discussed below). They also note that unlawful discrimination law is beneficial legislation with strong public interest and human rights underpinnings. This is argued as meriting a costs protection provision of the type provided for by the Costs Protection Bill.

52. However, in the Law Council's view, the disadvantages described by the AGD are significant and should not be overlooked in considering the suitability of the Costs Protection Bill, which constitutes a substantial departure from the norm.

53. On balance, these and other concerns discussed below underpin the Law Council's position not to support the Costs Protection Bill, but to put forward an alternative model for consideration, should Parliament be minded to pursue legislative reform.

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[39] AGD *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* (February 2023), 29.
[40] See eg Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *UNSW Law Journal* 699.
[41] See eg Power to Prevent Coalition Joint Statement, 14 April 2023 – *Time for equal-access in discrimination claims:* <https://www.legalaid.vic.gov.au/time-equal-access-discrimination-claims>.

Risk of unmeritorious applications and lack of court discretion

54. While few discrimination complaints made to the AHRC currently proceed to litigation and a final hearing in the courts,[42] there is a risk that overly extensive protection for applicants could result in many proceedings commenced in the court which otherwise would not be considered sufficiently meritorious. The ‘filter’ provided by the AHRC when terminating complaints on certain grounds under section 46PH of the AHRC Act and requirements to obtain leave under section 46PO(3A) of the AHRC Act would be undermined.

55. The Law Council is concerned that the Costs Protection Bill tilts the balance overly in favour of the applicant and moves the financial risk and disincentive for unmeritorious claims to the respondent. Notwithstanding the above provisions, this may result in large numbers of applicants bringing unmeritorious and protracted litigation without sufficient incentives to ensure efficiency within the justice system. This may have significant ramifications for the effective conduct of litigation, the benefits of alternative dispute resolution and settlements.

56. The strength of the protection under the equal-access model may be likely to encourage claims lacking in merit, since applicants would be aware that such a costs regime gives respondents a powerful incentive to make settlement offers, even in cases they would normally contest.

57. While the Law Council recognises that under the Costs Protection Bill, the applicant may be ordered to pay costs if the applicant instituted the proceedings vexatiously or without reasonable cause,[43] or the applicant’s unreasonable act or omission caused the other party to incur the costs,[44] these provisions will constitute the exception rather than the rule. Most applications, even where unmeritorious, will fall short of these thresholds, having regard to the Costs Protection Bill’s intent that the applicant will generally not be ordered by the court to pay costs incurred by another party.

58. For example, with respect to the threshold of whether the applicant’s unreasonable act or omission caused the other party to incur the costs’,[45] the Explanatory Memorandum states:

> *For example, subsection 46PSA(4) could apply where the applicant has unreasonably caused unnecessary delays in proceedings, failed to comply with court orders and rules, or otherwise abused the processes of the court. **This is intended to be a high threshold and reserved for rare cases.***[46] [emphasis added]

59. While, in practice, costs usually follow the event, the courts do currently have a broad discretion to make costs orders. However, this discretion is significantly curtailed by the Costs Protection Bill. Beyond the above-mentioned vexatious and reasonableness grounds, the court may only order that an unsuccessful applicant must pay costs where the respondent is entirely successful *and* does not have a

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[42] Ibid, 15-16.
[43] Costs Protection Bill, s 46PSA(6)(a).
[44] Costs Protection Bill, s 46PSA(6)(b).
[45] Which also appears at s 46PSA(4)), for the purposes of when the respondent is liable for costs under s 46PSA(2). This provides that if the court is satisfied that the applicant’s unreasonable act or omission caused the applicant to incur costs, the court is not required to order the respondent to pay the costs incurred as a result of that act or omission.
[46] Costs Protection Bill, *Explanatory Memorandum*, [13].

significant power advantage over the applicant *and* does not have significant or financial resources relative to the applicant.

60. While the Law Council agrees that there may be scope for judicial education regarding the exercise of the court's discretion in this area, it does not agree that the discretion itself should be so limited. Unfair outcomes may occur as a result.

Implications for respondents and unintended consequences

61. The Law Council recognises that the modifications at proposed paragraphs 46PSA(6)I(i)–(iii) of the Costs Protection Bill are aimed at addressing a significant issue with the equal-access model—that is, potential unfairness to respondents who have no particular advantage over the applicant.

62. The modifications in question take into account the fact that not all respondents to discrimination claims will have a significant advantage over the applicant in terms of resources or power (for example, being in a position to affect the applicant's employment).

63. However, this leaves intact the possibility that respondents who are not at fault and against whom unmeritorious claims are brought, will be required to pay the costs for the burden of disproving these claims. This will occur where respondents are considered to have a significant power advantage over, and significantly greater financial/other resources than, the applicant—even though the applicant was unsuccessful in making out their sexual harassment or unlawful discrimination claim.

64. The Law Council's consultations with practitioners revealed that, in their experience, many respondents in discrimination cases are in fact not well-resourced or powerful. That is, respondents are not all large corporations or government agencies. They may include, for example, schools, charities, small business operators, and individuals such as co-workers in the workplace, teachers or students in education settings, and volunteers who provide goods, services and facilities.

65. While not wealthy, an early career lecturer will usually be considered more powerful and well-resourced than, for example, a first-year student. A charity worker respondent may be similarly viewed, relative to a welfare recipient applicant. A small business operator may be similarly viewed, relative to an employee. Making such respondents pay costs to defend claims successfully would be unlikely to produce fair outcomes and may not be the intention of the Costs Protection Bill. However, under proposed 46PSA(6), even if a respondent were entirely successful in disproving the claim made, they would appear likely to be precluded from seeking their costs.

66. Further, as a matter of principle, it is inappropriate for the courts routinely to treat parties differently based on their power or financial means relative to other parties, particularly where they have not engaged in unlawful conduct.

67. Determining whether a respondent has a significant power advantage over the applicant, as proposed under subparagraph 46PSA(6)(c)(ii), may involve complex and difficult considerations for the court. In this context the Explanatory Memorandum to the Costs Protection Bill refers to relevant factors such as an employee's seniority, age, work history and conditions of employment, as well the presence of a hierarchical workplace culture or industry.[47] While well-intentioned, this approach may result in successful respondents being treated differently by the

[47] Costs Protection Bill, *Explanatory Memorandum*, [18].

courts due to factors outside their control, such as the nature of their industry or workplace structure.

68. The Law Council further considers that any perceived power advantage a respondent may have over an applicant is more properly considered in the determination of the sexual harassment or discrimination claim itself, rather than the award of costs where no discrimination has been found.

69. Practitioners have also raised concerns that, regardless of their resources or power relative to the applicant, individual respondents may experience significant stress, cost and time impacts where unmeritorious claims of sexual harassment or discrimination are made against them. In particular, the mental health impacts may be severe. There are concerns that, in tipping the balance in favour of the applicant, the Costs Protection Bill overlooks these impacts and undermines the compensatory purpose of costs orders.

Impacts on conciliation and settlement negotiations

70. Proposed section 46PSA of the Costs Protection Bill would replace existing section 46PSA of the AHRC Act. Existing section 46PSA provides that if:

    (a) court proceedings are instituted under section 46PO against a respondent to a terminated complaint; and

    (b) an applicant or respondent has made, or makes, an offer to settle the matter the subject of the complaint; and

    (c) the offer was or is rejected;

    the court or judge, in deciding whether to award costs in the proceedings, may have regard to the offer.

71. This mechanism is not replicated in proposed section 46PSA. Additionally, the Explanatory Memorandum remarks, with respect to the carve-out for where the applicant's unreasonable act or omission caused the other party to incur costs,[48] that:

    > *This is intended to be a high threshold and reserved for rare cases. For example, **a mere refusal of a settlement offer, refusal to participate in a conciliation**, the running of novel arguments or a self-represented litigant's lack of legal expertise **are not intended to amount to an unreasonable act or omission**.*[49] [emphasis added]

72. The Law Council agrees with the concerns expressed by the AHRC[50] that the operation of these two amendments may mean that there is no or minimal incentive for an applicant to consider a reasonable offer to settle a matter during the AHRC stage, early in the trial preparation or at all. The courts are not precluded from considering the applicant's response to settlement offers. However, having regard to the 'high threshold/rare cases' guidance in the Explanatory Memorandum, it is questionable whether, in most cases, the failure to accept a reasonable settlement offer will engage proposed section 46PSA(4) or section 46PSA(6)(b). As noted by the AHRC, this contrasts with the position under the FW Act, where the term

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[48] Costs Protection Bill, proposed s 46PSA(4) (see also proposed s 46PSA(6)(b)).
[49] Costs Protection Bill, *Explanatory Memorandum*, [13].
[50] Submission of the AHRC to the present inquiry, 6-7.

'unreasonable act or omission' has been interpreted to include the unreasonable rejection of a settlement offer.[51]

73. Similarly, there may be little incentive under the Costs Protection Bill for applicants to engage meaningfully in the AHRC's conciliation processes. These are, in the Law Council's view, essential to ensuring fairness, effective and speedy resolution, and efficiency. They assist parties to better understand the other parties' perspective, and their own position under the relevant law. This can assist in managing unrealistic expectations and prevent unmeritorious contentions from being made by either party in court, at the more expensive end of the system.

74. As noted by the AHRC, the proposed position in the Costs Protection Bill contrasts with section 570(2)(c) of the FW Act, which states that a party may be ordered to pay costs where the party unreasonably refused to participate in a matter before the Fair Work Commission, and the matter arose from the same facts as the proceedings.

75. With respect to settlement offers, the Law Council understands that there are concerns that certain conditional ('Calderbank') offers are a factor in discouraging applicants in discrimination cases, due to persistently low damages awards (particularly in cases that do not involve sexual harassment).[52] Such offers are made on the proviso that, should the offer be rejected and the eventual damages be lower, indemnity costs will be sought.[53]

76. The Anti-Discrimination Law Experts Group has observed:[54]

> *A costs consequence flowing from an offer of compromise may be suitable for commercial disputes between parties that have relatively equal resources and bargaining power. In cases involving a substantial inequality of both power and resources, such as discrimination cases, offers of compromise operate oppressively. They allow a respondent to leverage its resources and emotional detachment to impose fear and uncertainty on a complainant in order to deter them from continuing with their claim or to accept a low offer of settlement. In addition, the better-resourced party in a discrimination claim may be better able to research the (limited) court decisions to evaluate likely damages, informing the offers made.*

77. However, while it is sympathetic to these issues, the Law Council is concerned that the Costs Protection Bill's approach, which reduces incentives to resolve matters reasonably prior to entering the courtroom, may not be the most appropriate response. Alternative measures could instead ensure that damages awarded in discrimination matters are better in line with community standards, judicial education is offered to ensure that the power dynamics between parties are well understood, and legal assistance is available to level the playing field. Caution is warranted to avoid unnecessary prolongation of litigation and undermining of alternative dispute resolution processes, as per the AHRC's concerns.

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[51] FW Act, s 570(2)(b), eg, *Adamczak v Alsco Pty Ltd (No 4)* [2019] FCCA 7.
[52] See eg submission of ADLEG to the present inquiry, 13 December 2023, 4.
[53] See eg Clayton Utz, *Calderbank Offers – how to make sure the pen is mightier than the sword,* 14 June 2021: <https://www.claytonutz.com/insights/2021/june/calderbank-offers-how-to-make-sure-the-pen-is-mightier-than-the-sword>. Costs may be awarded on an indemnity basis – departing from the usual scales – under the *Federal Court of Australia Act 1976* (Cth), s 43(3)(g) or the *Federal Circuit and Family Court of Australia Act 2021* (Cth), s 192(4)(e).
[54] See submission of ADLEG to the present inquiry, 13 December 2023, 4.

Expanded options available to applicants

78. As noted, much of the research that has led to conclusions that applicants are in a vulnerable position compared to respondents, and adverse costs orders can deter the pursuit of legitimate claims, has been conducted in the context of sexual harassment in the workplace.[55]

79. Importantly, litigants in that context currently have the option of proceeding under the protection of section 570 of the FW Act (the relevant Part of the FW Act, Part 3-5A, was introduced[56] after the *Respect@Work* Report was published).

80. Part 3-5A provides that it is unlawful for a person to sexually harass another person in the workplace. Persons may be liable for acts contravening the Part which are performed by their employees or agents. Applications may be made to the Fair Work Commission to deal with a dispute about an alleged contravention of Part 3-5A, including by making a stop sexual harassment order (damages and other orders, including civil penalties, are also available). Disputes may further be dealt with by a court if not resolved by the Commission.[57]

81. As discussed, section 570 of the FW Act provides for a no-costs jurisdiction. This gives applicants the choice between pursuing a FW Act application (no costs) or an application under the AHRC Act (potential for costs orders).

Impact on unrepresented applicants

82. It is also important to note that unrepresented litigants do not recover their costs, so unrepresented applicants will not benefit from the Costs Protection Bill in terms of recovering their own costs. A litigant appearing in person is not entitled to recover any more than out of pocket disbursements, and cannot recover remuneration for time spent in presenting his or her case.[58]

83. However, an unrepresented applicant may benefit from those provisions in the Costs Protection Bill that preclude applicants from paying costs to other parties to the proceedings.

Lack of precedent

84. Although not an argument against adoption per se, the Law Council also raises for the Committee's consideration the fact that the equal-access model has not been adopted in any other comparable Australian discrimination law jurisdiction, and is therefore effectively untested.[59]

85. The AGD Consultation Paper of February 2023 notes that it is based on section 1317AH of the *Corporations Act 2001* (Cth), which protects whistleblowers

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[55] See eg Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Report, 2022); also Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking Richardson: Sexual Harassment Damages in the #MeToo Era' (2021) 49(2) *Federal Law Review* 231.

[56] Following the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).

[57] FW Act, see overview at s 527F. For the circumstances in which sexual harassment court applications may be made, see s 527T.

[58] *Cachia v Hanes* [1994] HCA 14, [24]-[26] and in discrimination claims see ; *Matthews v Hargreaves (No 4)* [2013] FMCA 4, [208]

[59] The ACT does have what might be described as a 'mildly asymmetrical' model, under which the default position is 'no-costs' but the tribunal may order respondents to pay applicants filing and other relevant fees in certain circumstances (but no vice-versa) – see *ACT Civil and Administrative Tribunal Act 2008* (ACT), s 48(2).

from adverse costs orders.[60] However, the number of cases in which that provision would be applicable is very low compared with the discrimination jurisdiction.[61] In addition, a prominent law firm noted in a submission to a Senate inquiry into the relevant Bill when that provision was introduced:[62]

> *We do not see any basis to only extend cost protection to one party to a dispute only, as currently proposed by s 1317AH. Such a proposal will lead to an unequal playing field and the risk of a proliferation of unmeritorious claims. It would also be an unusual position to be taken under law.*

86. This observation did not prevent the passage of the bill in question (the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth)), but the Costs Protection Bill applies to a much larger range of matters and parties, making this note of caution even more pertinent.

87. It should also be noted that the equal-access model would operate on a significantly wider basis than comparable models overseas. For example, section 11 of the *Access to Justice Act 1999* (UK) provides costs protection only for claims funded by the Legal Aid.[63] The so-called 'American rule' applicable in most US discrimination litigation produces a 'no-costs' regime, rather than an equal-access one.[64] In Canada, there is a complex cost-shifting regime for civil litigation, but in substance it is somewhere between the American and English rules.[65]

88. In summary, there appears to be no precedent for an asymmetrical costs regime such as equal access applying to every discrimination claim in a given jurisdiction, including where respondents may be individuals.

Potential for replication

89. The Law Council considers that discrimination law is rightly characterised as beneficial legislation. The High Court has stated that courts have a special responsibility to take account of and give effect to the purpose of legislation that protects or enforces human rights.[66]

90. However, courts have also found that the fact that discrimination proceedings invariably involve human rights issues has been held not to be an exceptional circumstance which would justify regular departure from the usual costs rule, although discretionary factors may lead to a different result.[67]

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[60] AGD *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* (February 2023), 28. There is a similar provision in the *Taxation Administration Act 1953* (Cth) – s 14ZZZC.
[61] Only one federal case to date appears to have made substantive mention of s 1317AH – *Watson v Greenwoods & Herbert Smith Freehills Pty Ltd* [2023] FCAFC 132 (30 August 2023) at [57]-[58].
[62] Herbert Smith Freehills, *Submission to the Senate Economics Legislation Committee inquiry into the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*, 23 February 2018, [submission no. 14], 1 March 2018: <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/WhistleblowerBill2017/Submissions>, 6.
[63] See UK Ministry of Justice: *Help for victims of discrimination:* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/395713/discrimination-leaflet.pdf>.
[64] See eg David Root, 'Attorney Fee-shifting in America: Comparing, Contrasting and Combining the "American Rule" and "English Rule"' (2005) 15(3) *Indiana International and Comparative Law Review* 583.
[65] See eg Erik Knutsen, 'The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada' (2010) 36 *Queen's Law Journal* 113.
[66] *Waters v Public Transport Corporation* (1991) 173 CLR 349.
[67] *Fetherston v Peninsula Health (No 2)* [2004] FCA 594.

91. The Law Council is conscious that should the Costs Protection Bill proceed, it may lead to adoption of the equal-access model with respect to other laws that are considered beneficial or remedial, and where disparities of power between parties commonly exist. It notes in this context that a variety of statutes have been accepted by the courts as being beneficial or remedial in nature. These concern subject matter such as Aboriginal land rights, native title and heritage, bridging visas, consumer protection, family law, social security, veterans' entitlements, workers' compensation and workplace relations.[68]

92. Should the equal-access model be expanded further, this may have implications for the effective operations of the courts. This again underlines the need for a cautious approach.

> **Recommendation**
>
> - **The Costs Protection Bill does not strike an appropriate balance between the interests of applicants and respondents in discrimination cases, and should not be passed in its current form.**

Alternative 'broad-discretion' approach

93. Should Parliament be minded to pursue legislative reform in this area, the Law Council proposes a more moderate approach to costs reform. As noted above, there are at present no specific provisions guiding the federal courts' discretion in making costs orders in cases under Commonwealth discrimination law, which means that there are limited prompts to take into account factors such as the parties' financial circumstances or the particular public interest in the subject matter of the litigation.

94. An alternative model may be described as a 'broad-discretion' model. Under this model, the courts would retain a discretion to award costs as appropriate in the circumstances of each case. However, given the strictness of the usual rule that costs follow the event, this discretion would be guided by legislation to ensure relevant considerations are borne in mind.

95. The broad-discretion model constitutes a relatively simple and equitable way to address the principal issue raised in the AGD Consultation Paper and by equal-access advocates (that is, that the risk of significant adverse costs orders is deterring legitimate complaints). It would allow arguments to be raised as to a range of relevant factors, including the parties' resources and conduct. It would give applicants a greater measure of protection than the status quo, while being more consistent with the principle of equality before the law than equal access.

96. The default position would remain that costs follow the event, but the court could make a different costs order (including that the successful respondent pay the unsuccessful applicant's costs or that there be no order as to costs) if it would be fair to do so, taking into account the following factors:

    - the financial circumstances of each of the parties to the proceedings and their capacity to obtain legal representation;

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[68] DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 8th ed, 2014, 9.3.

- whether the proceedings were frivolous or vexatious or misconceived or otherwise had little merit;
- the conduct of the parties (including in dealings with the Commission and whether a party's conduct caused the other party to incur costs unnecessarily);
- 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;
- whether any damages award would cover the legal costs of the applicant and/or any adverse costs order, and
- any other matters that the court considers relevant.

97. Many of these factors ought to be—but are reportedly not—currently taken into account by the courts in making (or declining to make) costs orders in discrimination cases due to the strength of the common law rule described above.

98. Under the Law Council's proposed model, the courts would be required to hear parties on costs in discrimination matters after making a determination on liability.

Justification

99. The broad-discretion model would retain costs following the event as a default position, preserving an appropriate level of disincentive for unmeritorious claims. While broader discretion can ultimately result in less certainty for parties as to which costs orders the court may make, the Law Council considers that such discretion would ultimately result in fairer outcomes for applicants and respondents than under the equal-access model.

100. This model would better acknowledge the variety of entities and individuals that are commonly respondents to discrimination complaints, including less well-resourced respondents. It would also give the courts greater guidance to award costs fairly, in recognition of the wide range of factors applicable to many discrimination cases. These include factors that are not addressed in the current version of the Costs Protection Bill, including the public interest in the subject matter of the litigation and amounts of damages.

101. Adopting a specific costs regime for discrimination matters—even one that retains the current default position—would make it clear to the courts that they are to approach costs differently in such matters.

102. Under this model, costs risks would still provide some disincentive for applicants to bring claims compared with a modified 'equal-access' model. However, the Law Council considers it to be more appropriate overall. It is also likely to ensure greater capacity for both applicants and respondents to have adequate access to justice and legal representation.

103. As noted, under the Law Council's proposed model, the courts would be required to hear parties on costs in discrimination matters after making a determination on liability. If applicants are unsuccessful in their claims, this requirement would still ensure an opportunity for them to be heard on the issue of costs, including where they have evidence of inability to pay. However, this model would have the benefit

of retaining the courts' discretion to respond appropriately in the circumstances of each case, including having regard to the role of costs in ensuring the most efficient management of the court process.

104. The Law Council considers that such a model would address the intent behind Recommendation 25 of the *Respect@Work* Report.[69] It would give applicants in federal sexual harassment claims the option of litigation under either discrimination law (with increased fairness in relation to potential costs orders) or the FW Act (if the claim is work-related and the applicant desires the relative certainty of a 'no-costs' jurisdiction).[70]

105. Having regard to the concerns flagged above, the Law Council's alternative broad-discretion model would permit judicial consideration of settlement offers (including the terms of any such offer), so that unreasonable refusals might still be discouraged. However, in recognition of the concerns expressed by ADLEG about respondents placing inappropriate pressure on applicants to settle, this would be just one of several considerations to be taken into account in determining the appropriateness of a costs order, to be balanced against other considerations such as the public interest in the subject matter of the litigation, the likely amount of damages to be awarded, and the relative financial circumstances of the parties.

Larger reform picture

106. The Law Council wishes to emphasise that costs protection is only one piece of the puzzle when it comes to the breadth of reform necessary to support victims of sexual harassment and unlawful discrimination in the Commonwealth jurisdiction.

107. As was recognised in the *Respect@Work* report, efforts by the judiciary to better understand discrimination complainants[71] (and address associated issues within its own ranks[72]) are important. The Law Council supports the establishment of a Federal Judicial Commission, which incorporates a strong focus on judicial education alongside its functions of handling complaints. Providing for a feedback loop can permit organisations to learn from complaints made and achieve improvements in education and training as a result.[73]

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[69] AHRC, *Respect@Work: Sexual Harassment National Inquiry Report (2020)*: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>. AHRC, *Respect@Work: Sexual Harassment National Inquiry Report (2020)*: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

[70] A similar choice in the Queensland jurisdiction was discussed, and recommended to be maintained, in the Queensland Human Rights Commission's recent review of the *Anti-Discrimination Act 1991* (Qld) – see QHRC, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991,* July 2022, p 182 and recommendation 11.4.

[71] See eg The Hon Justice J Basten, *Judicial education on "gender awareness" in Australia* (2021): <https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/judicial_education_gender_awareness.html>. See eg The Hon Justice J Basten, *Judicial education on "gender awareness" in Australia* (2021): <https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/judicial_education_gender_awareness.html>.

[72] See HCA, *Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia* (2020), <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>. See HCA, *Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia* (2020), <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>.

[73] Law Council of Australia, *Scoping the establishment of a federal judicial commission,* Submission to the Attorney-General's Department, 8 March 2023, 25.

108. Leading experts have noted the need for a range of complementary measures, including:[74]

- strengthening alternative dispute resolution options;[75]
- agency assistance (intervening and supporting complainants, particularly in important test cases);
- a more inquisitorial role for institutions such as the Fair Work Commission and the AHRC; and
- greater government resourcing for free or low-cost legal representation in discrimination cases.

109. The Law Council agrees that complementary measures would help to ensure that Commonwealth law could more effectively protect victims of harassment and discrimination.

110. In particular, the Law Council is highly concerned that legal aid grant funding—which ensures representation before the courts—is barely available for civil matters, including discrimination. Despite the prevalence of legal need related to civil law issues, civil law matters only account for 4 per cent of grants for representation by legal aid commissions.[76] Criminal and family matters make up most of these grants.

111. It is time for governments to resource access to justice for victim-survivors of sexual harassment and unlawful discrimination, so that they are appropriately advised of their options, are empowered to make decisions about their best course of action, and have greater representation before the courts.

112. In the context of calls made for a more inquisitorial approach by the AHRC, the Law Council is cognisant that a range of relevant reforms have followed the *Respect@Work* report, most recently under the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (Cth). These include:

- a new positive duty in the *Sex Discrimination Act 1984* (Cth) (**SDA**). This is a duty on employers and persons conducting a business or undertaking to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, sex-based harassment, etc;
- new functions and powers on the AHRC to monitor and assess compliance with the positive duty in the SDA (commencing December 2023);
- conferring a new inquiry power on the AHRC to allow it to inquire into, and report on, issues of systemic unlawful discrimination or suspected systemic unlawful discrimination across all four federal discrimination acts; and
- permitting a representative body (such as a trade union, advocacy group or human rights organisation) to initiate proceedings in the federal courts if it has lodged a complaint with the AHRC on behalf of one or more ‘persons aggrieved’ and the representative complaint is not able to be conciliated at the AHRC and is terminated.

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[74] Beth Gaze and Rosemary Hunter, ‘Access to Justice for Discrimination Complainants: Courts and Legal Representation’ (2009) 32(3) *UNSW Law Journal* 699, 699-702.
[75] This option is also strongly supported by the AHRC – see *Free and Equal: A reform agenda for federal anti-discrimination laws (2021)*: <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>, Chapter 6.
[76] PwC (for National Legal Aid), The benefits of providing access to justice (Report, January 2023) 4.

113. It will be important to monitor the extent to which these and other *Respect@Work* reforms, will alleviate the burden on individual complainants as intended, including in the court room.

Recommendation

- **The Costs Protection Bill should be redrafted to reflect the 'broad-discretion' model outlined above**.

If Costs Protection Bill proceeds based on equal-access model—necessary improvements and clarifications

Provision for review

114. The Anti-Discrimination Law Experts Group also recommended in its submission to this inquiry that the Costs Protection Bill 'make provision for a three- or five-year review of the operation and effectiveness of the amendments in achieving their objects, including through case data analysis.'[77] The Law Council supports this recommendation.

Recommendation

- **Regardless of the model adopted, provision should be made for a review, after a suitable period, of the operation and effectiveness of the amendments made by the Costs Protection Bill.**

Proposed section 46PSA(6)

115. If, despite the Law Council's recommendation, Parliament is minded to proceed with the Costs Protection Bill, clause 3 of Schedule 1, which would replace section 46PSA of the AHRC Act, in particular is problematic and should be revised.

116. As flagged, proposed paragraph 46PSA(6)(c)(ii) as drafted would require courts to assess whether a respondent has a 'significant power advantage' over the applicant, which would be a difficult task for the court. As discussed above, this may have arbitrary consequences for individual respondents. It is also unclear that this power advantage should be relevant for the determination of costs in a situation where the respondent has succeeded on all claims.

117. The Law Council recommends deleting proposed 46PSA(6)(c)(ii), leaving the focus on the more concrete issue of financial resources.

118. Proposed section 46PSA(6)(c)(iii) refers to whether the respondent has significant financial 'or other' resources relative to the applicant. It is unclear what kinds of other, non-financial resources are intended to be taken into account. The Explanatory Memorandum does not clarify this. To avoid potentially complex assessments of a range of resources, the Costs Protection Bill should specify what other resources are relevant, or delete this reference.

[77] See eg submission of ADLEG to the present inquiry, 13 December 2023, 2.

119. Proposed section 46PSA(6)(c) enables regard to be had to the respondent's financial or other resources relative to the applicant[78] only where the respondent is successful on all claims.[79] Should the respondent be mostly successful (that is, on 80 per cent of the applicant's claims), this factor cannot be taken into account, even if the respondent is, for example, an individual or small business. The Costs Protection Bill should enable the respondent's financial resources relative to the applicant to be taken into account for the determination of costs where the respondent has been at least partially successful.

120. In addition, a provision should be inserted into the Costs Protection Bill specifically enabling the parties to make submissions on their ability to afford costs, so that the court has the information necessary to make the relevant determination.

Recommendations

- **Proposed section 46PSA(6)(c)(ii) of the Costs Protection Bill should be deleted.**
- **As a consequence, proposed section 46PSA(6)(c) should make only two stipulations—that the respondent is successful, and that the respondent does not have significant financial or other resources relative to the applicant.**
- **Proposed section 46PSA(6)(c)(iii) should clarify what is meant by 'other resources', or this reference should be deleted.**
- **The Costs Protection Bill should enable the respondent's financial resources relative to the applicant's to be taken into account for the determination of costs, where the respondent has been at least partially successful.**
- **A provision should be added to permit the parties to make submissions relevant to the court's determination of their relative ability to afford costs.**

Settlement and conciliation

121. For the reasons set out above, the Law Council agrees with the AHRC's recommendations that the Costs Protection Bill should be amended to enable the court to have regard to settlement offers made prior to, and during, the proceedings in the determination of costs.

122. This would be preferable to the AHRC's alternative proposal of amending the Explanatory Memorandum to the Costs Protection Bill to include the unreasonable rejection of a settlement offer as an example of a possible 'unreasonable act or omission' under proposed sections 46PSA(4) and 6(b).

123. The Law Council further agrees with the recommendation that the Costs Protection Bill should be amended to enable the court to have regard to the participation of the

[78] And whether there is a significant power advantage over the applicant, under proposed section 46PSA(6)(ii).
[79] As noted in the Explanatory Memorandum at [16], the reference in section 46 PSA(6)(c)(a) to a 'respondent who was successful in the proceedings' refers to whether a respondent has had all claims against them dismissed. That is, the applicant has not been successful on any ground.

parties in the AHRC's conciliation processes in the determination of costs, in alignment with section 570(2)(c) of the FW Act.

Recommendations

- **The Costs Protection Bill should be amended to enable the court to have regard to settlement offers made prior to, and during, the proceedings in the determination of costs.**
- **The Costs Protection Bill should be amended to enable the court to have regard to the participation of the parties in the AHRC's conciliation process in the determination of costs, in alignment with section 570(2)(c) of the FW Act.**

Other clarifications

124. The effect of the Costs Protection Bill on applications not made under section 46PO(1) of the AHRC Act—including those made under section 46PO(3A) (seeking leave to commence a proceeding), section 46PP of the AHRC Act (interim injunctions to maintain status quo or rights of parties), and representative actions brought under Part IVA of the *Federal Court of Australia Act 1976* (Cth)—is unclear.

Recommendations

- **Clauses 3 and 7 of Schedule 1 should be amended to clarify the effect of the new costs regime on interlocutory proceedings and representative proceedings not initiated under section 46PO(1) of the AHRC Act.**

125. Under proposed section 46PSA(2), subject to proposed section 46PSA(4), 'if the applicant is successful in proceedings on one or more grounds, the court must order each respondent against whom the applicant is successful to pay the applicant's costs'. Under proposed section 46PSA(3), the court may order that the costs to be paid by the respondent be assessed on an indemnity basis or otherwise.

126. Under proposed section 46PSA(4), if the court is satisfied that the applicant's unreasonable act or omission caused the applicant to incur costs, the court is not required to order the respondent to pay the costs incurred as a result of that act or omission.

127. At [10], the Explanatory Memorandum says of proposed section 46PSA(2) that:

> *The court maintains the discretion to apportion costs as it sees fit. This may include orders allocating some or all of the costs to the applicant depending on the circumstances of the case. For example, if the court considers it appropriate, it could order that the respondent pay 80% of the applicant's costs.*

128. However, this discretion is not clear on the face of the Costs Protection Bill. It would appear that the only discretion available to the court is under proposed section 46PSA(4), referring to the applicant's unreasonable act or omission which

caused the applicant to incur costs. At [13], the Explanatory Memorandum states, as discussed, that:

> *This is intended to be a high threshold and reserved for rare cases. For example, a mere refusal of a settlement offer, refusal to participate in a conciliation, the running of novel arguments or a self-represented litigant's lack of legal expertise are not intended to amount to an unreasonable act or omission.*

129. If a respondent is successful on the majority of grounds put forward by the applicant, most of which contain novel arguments, but unsuccessful on one or two grounds, it is unclear that the court would have the discretion to apportion costs between the respondent and the applicant as the Explanatory Memorandum suggests, unless proposed section 46PSA(4) is engaged, which would be rare.

130. The Costs Protection Bill should be amended to make it clear that such a discretion exists.

Recommendation

- **Proposed sections 46PSA(2)–(4), concerning the respondent's liability for costs, should be modified to clarify that the court maintains the discretion to apportion costs between the respondent and applicant as it sees fit.**

131. The Law Council has also had feedback that it is unclear how, under proposed section 46PSA(2), multiple respondents are to be liable (for example, joint or severally liable). While the Explanatory Memorandum's statements regarding the court's discretion to apportion costs as it sees fit may be intended to address this situation, this issue should be clarified in the Costs Protection Bill.

Recommendation

- **Proposed section 46PSA(2), concerning the respondent's liability for costs, should be amended to clarify whether/how respondents are jointly or severally liable to pay a successful applicant's costs.**

132. The Law Council queries the interaction between the new costs regime and existing court powers relating to cost capping, security for costs, and third-party costs orders.

133. Presumably, since judicial discretion as to costs is subject to modifying legislation, which will include the new section 46PSA under Part 2 (Consequential Amendments) of the Costs Protection Bill, these new provisions would take precedence. However, this should be clarified in the legislation and Explanatory Memorandum.

Recommendation

- **The legislation and Explanatory Memorandum for the Costs Protection Bill should be amended to clarify how the amendments in the Costs Protection Bill interact with existing court powers relating to cost capping, security for costs and third-party costs.**

134. The Law Council considers that a ‘respondent,’ for the purposes of the amendments to be made by the Costs Protection Bill, should exclude a litigation guardian for a person with disability. This is to avoid the risk that litigation guardians may be liable for costs.

Recommendation

- **A respondent, for the purposes of the Costs Protection Bill, should be defined to exclude a litigation guardian for a person with disability.**

Law Council OF AUSTRALIA

Attachment A

Costs in Federal Discrimination Matters – Background, Research and Current Arrangements

Legislative framework for federal discrimination complaints

1. If a person considers they have been subject to unlawful discrimination, under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) they can commence a proceeding and seek a judicial remedy, if:

   - the person makes a complaint to the Australian Human Rights Commission (**AHRC**) about alleged 'unlawful discrimination'[1]; and
   - complaint has been terminated by the President of the AHRC under the AHRC Act.[2]

2. In some circumstances, a person may require the court's leave under section 46PO(3A) of the AHRC Act if the complaint is terminated on particular grounds.

3. Following the termination of a complaint to the AHRC, an application may be made to the Federal Court (**FCA**) or the Federal Circuit and Family Court of Australia (Division 2) (**FCFCOA**), by or on behalf of an affected person, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.[3]

4. For those matters which proceed to a final hearing, either court may order costs under discretionary powers in the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (**FCFCOA Act**) respectively. The discretion in these Acts is broadly stated, with further detail provided in rules and practices notes (relevant provisions of which are set out below).

The Respect@Work Recommendations and Commissioned Research

5. Sex Discrimination Commissioner Kate Jenkins (on behalf of the AHRC) made 55 recommendations in the *Respect@Work: Sexual Harassment National Inquiry Report*.[4] Most relevant for present purposes were recommendations 24 and 25, under the heading 'Damages and Costs':

   > ***Recommendation 24:*** *The Australian Government conduct further research on damages in sexual harassment matters and whether this reflects contemporary understandings of the nature, drivers, harms and impacts of*

[1] *Australian Human Rights Commission Act 1986* (Cth), s 3 contains the definition of 'unlawful discrimination'.
[2] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1).
[3] Ibid ss 46PO(1) and (2A).
[4] Available at: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

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sexual harassment. This research should inform judicial education and training.

Recommendation 25: *Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the Fair Work Act 2009 (Cth).*

6. The stated rationale for Recommendation 25 was that a coalition of Legal Aid and community legal services submitted to the Respect@Work inquiry that the potential for adverse costs orders 'operates as a disincentive to pursuing sexual harassment matters under the Sex Discrimination Act.'[5] Similar submissions had been made to a Senate inquiry into the operation of that Act in 2008 as well, although that inquiry did not result in a similar recommendation due to disagreement over whether costs reform was likely to be an effective measure.[6] Commissioner Jenkins proceeded to make the above recommendation, but it is unclear from the report why it should apply to all discrimination cases lodged under the AHRC Act, rather than only ones involving sex-based discrimination.

7. For the implementation of Recommendation 24, the Attorney-General's Department (**AGD**) engaged Emerita Professor Margaret Thornton, Mr Kieran Pender and Madeleine Castles to conduct the recommended research.

8. The subsequent research paper by Thornton, Pender and Castles[7] found multiple shortcomings of the usual 'costs follow the event' model for complainants in discrimination cases under the *Sex Discrimination Act 1984* (Cth) (**SDA**).[8] The authors also cited prior research that indicated most cases in the federal anti-discrimination jurisdiction are settled rather than resolved by a full trial.[9]

9. The research paper undertook an analysis of all federal, state and territory age, sex, disability and race discrimination matters from 1984 to 2021 that resulted in a final decision.[10] 1,979 decided cases (involving all types of actionable discrimination across Australia) were studied.

10. Success rates for applicants in the federal jurisdiction ranged from around half for sexual harassment claims, to one third in sex discrimination claims, to under 20% in race and age discrimination claims.[11]

11. Sexual harassment cases, at least in recent years, have tended to result in more significant damages awards than other discrimination cases.[12] The authors noted however that while damages for sexual harassment matters were increasing, the number of cases was decreasing and the proportion resulting in an award of damages also decreasing (although, they conceded that the research had not accounted for meritorious claims that had been settled on terms favourable to the applicant,

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[5] Ibid, 507.
[6] Ibid.
[7] Thornton, Pender and Castles (for the AGD), *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study*: <https://www.ag.gov.au/rights-and-protections/publications/damages-and-costs-sexual-harassment-litigation-doctrinal-qualitative-and-quantitative-study>.
[8] Ibid, 5-7.
[9] Ibid, 5 and 77.
[10] Ibid, 18.
[11] Ibid, 18-25.
[12] Ibid.

including where an applicant's settlement may exceed the level of damages awarded by a court).[13]

12. The authors found, in relation to the sexual harassment matters that they considered, that:[14]

- in state and territory jurisdictions, which are predominantly 'no costs' jurisdictions,[15] the majority of sexual harassment claims resulted in no costs orders;[16]
- at a federal level, 70 per cent of matters over the full study timeline (from 1984 to 2021) resulted in no costs orders, with the remaining matters split between the applicant and respondent being ordered to pay costs;[17]
- however, since 2001, when the federal scheme evolved from being a no costs jurisdiction (with the Human Rights and Equal Opportunity Commission responsible for determining most cases) to the model described above, only 35 per cent of cases have resulted in no costs orders.[18] Specifically:
  - respondents were ordered to pay a successful applicant's costs 67 per cent of the time, no costs were ordered in 23 per cent of cases and costs were awarded against successful (or partially successful) applicants in 10 per cent of cases;[19] and
  - in matters where the applicant was unsuccessful, the applicant has been ordered to pay the respondent's costs 56 per cent of the time and respondent has never been ordered to pay the applicant's costs.[20]

13. The paper observed the same trends in federal discrimination matters. That is, since 2001:

- the applicant has been ordered to pay costs in between 47 per cent and 55 per cent of matters (depending on the attribute in question);[21]
- the respondent has been ordered to pay costs in between 0 per cent (age discrimination) and 21 per cent (sex discrimination) matters.[22]

However, unlike the sexual harassment results, that latter data was not tracked against the outcome of the matter.

14. The authors also interviewed practitioners, and recorded views that:

- costs for preparation and the conduct of a trial in sexual harassment matters have been increasing, and often eclipse any final award for damages or in some cases, settlement where costs are not part of the settlement;[23]

[13] Ibid, 20-21 and 42.
[14] Ibid, 13-14.
[15] Ibid, 6.
[16] Ibid, 34.
[17] Ibid, 34-35.
[18] Ibid, 13.
[19] Ibid.
[20] Ibid, 14.
[21] Ibid, 39.
[22] Ibid.
[23] Ibid 14.

- the overwhelming proportion of complaints are settled and in the experience of participants these settlements tend to result in a higher payments than damages awarded by a court;[24]
- there is an inequality in bargaining power between claimants and respondents. The evidence suggests that socio-economic division exists within the applicant and respondent classes which affects the quantum of damages, the type of evidence gathered and the ability to litigate. It suggests that there is a class of vulnerable workers who are significantly disadvantaged by the existing framework;[25]
- from an applicant's perspective:
  - costs risk is the principal motivator to settle; and
  - the cost of litigation and the risk of being ordered to pay the respondent's costs, is a major barrier to pursuing even meritorious claims.[26]
- from a respondent's perspective, costs are a motivating factor, but reputational risks, particularly for larger entities, can often be a bigger motivator than costs;[27] and
- *Calderbank* offers are often used to force settlement, and a complainant who refuses an offer, risks an adverse indemnity costs order against them.[28] In one prominent case against the software company Oracle, this led the judge to observe:

  > *[T]he final outcome of these proceedings, in financial terms at least, will probably be devastating for Ms Richardson both financially and personally. Although the findings made in the earlier judgment provide public vindication of her position, she will remain solely responsible for the payment of the bulk of her own legal costs and obliged to pay a high proportion of the legal costs of the respondents. That will be a very high price to pay for her victory.*[29]

- *Calderbank* offers are rarely encountered in no costs jurisdictions.[30] However, other litigation tactics – mainly benefiting the wealthier party – may still be employed.[31]

Current Costs Arrangements

Procedure and costs in the Federal Court

Overarching obligations relating to party conduct

15. Section 37M(1) of the FCA Act provides the overarching purpose of the court's civil practice and procedure provisions is to facilitate the just resolution of disputes according to law; and as quickly, inexpensively and efficiently as possible. Section 37M(2) provides that the overarching purpose includes a list of objectives, one of

[24] Ibid, 77.
[25] Ibid, 77-78.
[26] Ibid 14 and 90-91.
[27] Ibid.
[28] Ibid.
[29] From the judgment in *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102 at [51].
[30] Thornton, Pender and Castles (for the AGD), *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study*, 91.
[31] Ibid, 91-92.

which is 37M(2)(e): 'the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute'.

16. The parties 'must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose'.[32] Each party's lawyer must take account of and assist their client to comply with that duty.[33] In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with those duties.[34]

Case management

17. Under the *Federal Court Rules 2011* (Cth) (**FCA Rules**), the Court may make directions for the management, conduct and hearing of a proceeding.[35] These include in relation to:

> *The attendance by parties at a case management conference with a Judge or Registrar to consider the most economic and efficient means of bringing the proceeding to trial and of conducting the trial.*[36]

18. If a party fails to comply with a direction of the Court or Judge, the Court or Judge may award costs against a party, including an order that costs are payable on an indemnity basis.[37]

19. The Court has the power to order an applicant to pay security for costs in discrimination proceedings[38], although the Court has recognised "[t]he potential chilling effect of requirements to provide security for costs on individual litigants" and the impact an order for security could have on an impecunious litigant's access to justice.[39]

Costs discretion in the Act and default position

20. The FCA Act provides the discretion to order costs in the following terms:

> *Except as provided by any other Act, the award of costs is in the discretion of the Court or Judge.*[40]

21. Section 43(3) of the FCA Act provides, without limiting the discretion of the Court or a Judge in relation to costs, that the Court or Judge may do any of a number of listed things in relation to costs. These include making an award of costs at any stage in a proceeding, making different awards of costs in relation to different parts of a proceeding, making an order or award costs in specified proportions or a specified

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32 FCA Act, s 37N(1).
33 Ibid, s 37N(2)(b).
34 Ibid, s 37N(4).
35 FCA Rules, r 5.04.
36 Ibid, r 5.04(3) – Item 32 in table.
37 FCA Act, s 37P(5) and (6).
38 FCA Act, s 56: see *Waters v Commonwealth of Australia* [2014] FCA 1107, *Dye v Commonwealth Securities Limited* [2012] FCA 992, *Croker v Sydney Institute of TAFE (State of New South Wales)* (2003) FCA 942 at [26]
39 *Kiefel v Victoria* [2014] FCA 604, [34] and [40]. See also *McCardle v Lyons* [2019] FCA 1554.
40 Ibid, s 43(2).

sum, and awarding costs in favour of or against a party whether or not the party is successful in the proceeding.

22. The Federal Court website notes that in 'most matters in the Federal Court, the unsuccessful party is ordered to pay part of the legal costs of the successful party'.

23. The purpose of this default position is described in the FCA's Cost Practice Note (**GPN-COSTS**)[41] as to 'compensate a successful party rather than punish an unsuccessful party.'[42] It is said to stem from a 'reasonable expectation' on the part of a successful party of being awarded costs against the unsuccessful party, in the interests of fairness.[43] Such an order may be modified to reflect partial success in a set of claims.[44] The risk of a costs order for unsuccessful applications is also intended to serve as a deterrent to frivolous, misconceived or unmeritorious claims.[45] It should be noted that the appropriateness of this default position in public interest cases has been questioned by commentators.[46]

Rules relating to costs

How costs are determined

24. Further rules relating to costs are prescribed in Part 40 of the FCA Rules. The ordinary course is that costs are as between party and party.[47] If the Court reserves the question of costs, and no further order is made, costs follow the event.[48] Also, if no order for costs is made on an interlocutory application or hearing, the costs of the application or hearing either follow the event or are taken to be costs in the cause of the successful party.[49]

25. The FCA Rules also provides for the order of costs incurred because of a lawyer's misconduct.[50]

26. If an order is made in favour of a party for the payment of their costs, it must be taxed under that Part unless agreed by the parties.[51] The GPN-COSTS notes that 'the Court expects parties to make a genuine effort…to negotiate with a view to resolving costs issues between them at the earliest opportunity.'[52]

27. The GPN-COSTS states that the Court's 'preference, wherever it is practicable and appropriate to do so, is for the making of a lump-sum costs order'.[53] The GPN-COSTS provides for the parties to give material in support and response and, with leave, to make submissions.[54] This material is to generally relate to the costs of providing

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[41] FCA, *Costs Practice Note (GPN-COSTS)*: <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-costs>.
[42] Ibid, 5. See further eg *Latoudis v Casey* (1990) 170 CLR 534 at 543, 562-563, 567.
[43] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67], [134]; also *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121].
[44] *Uniline Australia Ltd v Sbriggs Pty Ltd* (No 2) [2009] FCA 920, [38] and [53]-[54].
[45] *Hillebrand v Penrith Council* [2000] NSWSC 1058.
[46] See eg Narelle Bedford, 'The Winner Takes it All: Costs as a Mechanism of Control in Public Law' (2018) 30(1) *Bond Law Review* 119, 120.
[47] FCA Rules, r 40.01.
[48] Ibid, r 40.03.
[49] Ibid, r 40.04.
[50] Ibid, r 40.07.
[51] Ibid, r 40.12.
[52] GPN-COSTS, [3.2].
[53] GPN-COSTS, [4.1].
[54] Ibid, [4.2].

services, although also includes 'any special features of the case which may impact the assessment of costs or any other relevant and important matters not mentioned above'.[55]

28. Otherwise, costs in most matters proceed by way of long-form bills of costs and, potentially, taxation (ie assessment by a Registrar of costs if they cannot be determined by negotiation between the parties). A taxing officer must allow for the work done in accordance with Schedule 3 to the FCA Rules.[56] Schedule 3 prescribes amounts for items of work done and services performed (rather than by reference to the stage of a hearing). Relevantly item 11 provides for additional amounts to be allowed for matters relating to 'skill care and responsibility', including complexity of the matter, the difficulty or novelty of the questions involved, certain matters relating to the conduct of the lawyer and 'any relevant matter'.

Costs capping

29. The FCA Rules permit a party to apply to the Court for an order specifying the maximum costs (capping) as between party and party that may be recovered for the proceeding.[57] Such amount will not include an amount that a party is ordered to pay because, amongst other things, they have 'not conducted the proceeding in a manner to facilitate a just resolution as quickly, inexpensively and efficiently as possible, and another party has been caused to incur costs as a result'.[58]

30. The GPN-COSTS provides:

> *The Court will consider the consequences of making such an order from the perspective of all parties in the proceeding. Relevant matters that may be taken into consideration include: the timing of the application, the complexity of the factual or legal issues raised, the quantum of damages claimed and the nature of the remedies sought, the impact on the parties of making such an order, whether there is a public interest element to the case, the proportionality of the costs being incurred and the substance of the case.*[59]

31. Anecdotally, the Law Council understands that costs capping orders require significant amounts of work to obtain, and are usually only used by practitioners acting *pro bono* for impecunious applicants in cases involving issues of the public interest.

Settlement offers

32. The FCA Rules also deal with costs in the context of settlement offers. Generally, if an offer is made and not accepted, and the party that does not accept the offer obtains a less favourable outcome than the offer, costs are available to the offering party on an indemnity basis after 11am on the second business day after the offer was served.[60]

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[55] Ibid, Annexure A, Part B, [1](l).
[56] FCA Rules, r 40.29.
[57] Ibid, r 40.51.
[58] Ibid, r 40.51(2)(d).
[59] GPN-COSTS, [3.11] (footnote at the end of this passage refers to *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864; *Haraksin v Murrays Australia Ltd* [2010] FCA 1133; *King v Virgin Australia Airlines Pty Ltd* [2014] FCA 36 and *Shurat HaDin, Israel Law Center v Lynch (No 2)* [2014] FCA 413). See also *King v Jetstar Airways Pty Ltd* [2012] FCA 413 (re an appeal).
[60] FCA Rules, r 25.14.

Procedure and costs in the Federal Circuit and Family Court

Overarching obligations relating to party conduct

33. The FCFCOA Act provides the same overarching purpose of the court's civil practice and procedure provisions and duties on the parties as the FCA Act.[61]

Case management

34. At the first court date, the court must make orders for the conduct of the proceeding.[62] This includes discretion to make orders and directions in relation to costs.[26]

35. If a party fails to comply with a direction of the Court or Judge, the Court or Judge may award costs against a party or that costs are payable on an indemnity basis.[63]

Costs discretion in the Act

36. The FCFCOA Act provides the discretion to order costs in the following terms:

> *Except as provided by the Rules of Court or any other Act, the award of costs is in the discretion of the Federal Circuit and Family Court of Australia (Division 2) or Judge.*[64]

37. The FCFCOA website notes that:

> *In general federal law proceedings, the Court normally awards costs to a successful party. They are intended to reimburse a party (usually the successful one) for their legal costs.*[65]

Rules relating to costs

How costs are determined

38. Part 22 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) (**FCFCOA Rules**) deals with the determination of costs.

39. The court may make a costs order at any stage of the proceeding, or within 28 days of a final order, or within any further time allowed.[66] It may set the amount of the costs, set the method by which they are calculated, or refer the costs for taxation under Part 40 of the FCA Rules.[67]

40. Unless the court otherwise orders, a party entitled to costs in a general federal law proceeding (other than a proceeding to which the *Bankruptcy Act 1966* (Cth) applies)

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[61] FCFCOA Act, s 190.
[62] *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) (**FCFCOA Rules**), r 10.01.
[63] Ibid, ss 192(3) and (4). *Ellis v Adventureworld (WA) Pty Ltd as Trustee of The Adventureworld Unit Trust* [2016] FCCA 2504
[64] Ibid, s 214(3).
[65] FCFCOA, *Legal costs in general federal law matters*: <https://www.fcfcoa.gov.au/gfl/pubs/gfl-costs>.
[66] FCFCOA Rules, r 22.02(1).
[67] Ibid, r 22.02(2).

is entitled to costs in accordance with Schedule 2 and disbursements properly incurred.[68]

41. Part 1 of Schedule 2 of the FCFCOA Rules prescribes costs by reference to the stage of the proceeding – with costs set for, amongst other things, initiating or opposing an application up to the first court date, for an interim or summary hearing, and for preparation for a final hearing of varying lengths.

Costs capping

42. The Court may specify the maximum costs that may be recovered on a party and party basis by order at the first court date and on its own initiative or on the application of a party.[69] Such amount will not include an amount that a party is ordered to pay because, amongst other things, they have 'otherwise caused another party to incur costs that were not necessary for the economic and efficient progress of the proceeding or hearing of the proceeding'.[70] The Court may vary the maximum costs specified if in its opinion there are 'special reasons and it is in the interests of justice to do so'.[71]

Miscellaneous rules

43. The FCFCOA Rules also provide for costs in special circumstances, including expenses for witness attendance;[72] expenses for preparation of expert reports;[73] for solicitors appearing as advocates;[74] for certification that the engagement of an advocate was reasonable,[75] and for counsel to appear.[76]

44. Part 26 of the FCFCOA Rules provides for proceedings alleging discrimination. This Part provides for the making of approved forms and for a copy of the application to be given to the AHRC.

45. Part 2 of Schedule 2 to the FCFCOA Rules provides an abridged table of costs for migration proceedings.

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[68] Ibid, r 22.09.
[69] Ibid, r 22.03(1).
[70] Ibid, r 22.03(2)(c). see *Hudson v Australian Broadcasting Corporation* [2016] FCCA 917 and refused in *Perkiss v State of New South Wales (Technical and Further Education Commission) (TAFE Illawarra)* [2016] FCCA 957
[71] Ibid, r 22.03(3).
[72] Ibid, r 22.11.
[73] Ibid, r 22.12.
[74] Ibid, r 22.13.
[75] Ibid, r 22.14.
[76] Ibid, r 22.15.