Law Council
OF AUSTRALIA

Office of the President

24 April 2023

Katherine Jones PSM
Secretary
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

By email: RespectatWork@ag.gov.au

Dear Ms Jones,

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

This letter responds to the request made by the Attorney-General's Department (**AGD**) for submissions in response to its *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* (**Consultation paper**).[1]

The Law Council of Australia is grateful to:

- the following of its Constituent Bodies—the Law Society of New South Wales; the Law Society of South Australia; the ACT Law Society; the Law Institute of Victoria; the Law Society of Western Australia; and the Victorian Bar; and
- its Equal Opportunity Committee; its National Human Rights Committee; its Business and Human Rights Committee; and the Class Actions Committee, Federal Court Liaison Committee, and Federal Circuit Court Liaison Committee of its Federal Dispute Resolution Section,

for their input in preparation for this response.

Executive Summary

1. The Law Council acknowledges the Australian Government's significant progress on the implementation of the Australian Human Rights Commission's (**AHRC**'s) Respect@Work Report of 2020.[2] The Law Council has supported the reforms made to date to implement the recommendations of the Respect@Work Report.[3] However, it is not currently in a position to support any of the proposed models for reform of the cost model for Commonwealth anti-discrimination laws, as a potential means to respond to recommendation 25 of that Report.

[1] AGD, *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws,* February 2023: <https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/user_uploads/discussion-paper-review-appropriate-cost-model-commonwealth-anti-discrimination-laws.pdf>.

[2] Australian Human Rights Commission (AHRC), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, March 2020) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

[3] See eg Law Council of Australia, *Respect@Work bill an important milestone,* Media Release, 29 November 2022: <https://www.lawcouncil.asn.au/media/media-releases/respect-at-work-bill-an-important-milestone>.

2. The Law Council has received a range of views from its Constituent Bodies and practitioners on its Section and advisory committees on how, or whether, to proceed with reform in this area.

3. Many practitioners are of the view that the proposed cost neutrality models raise access to justice concerns, on the basis that those models would make legal representation harder for parties to secure.

4. The two options that attracted the most support from the profession are the equal access model and maintaining the status quo. The advantages and disadvantages of each option raised by practitioners are discussed in the submission.

5. The views of legal practitioners are also evolving, given changes to related laws such as the *Fair Work Act 2009* (Cth) creating new options for applicants.[4] In addition, there are upcoming opportunities to consider the anti-discrimination law framework as a whole.

6. With this in mind, the Law Council reserves its position on the proposed reform at this time.

7. This letter conveys the views of the profession as received—noting that the Law Council has received views from a wide range of legal practitioners, including those who are routinely involved in relevant litigation, as well as academics and community legal centres—and outlines some considerations which the Law Council believes to be important for the AGD to take into account in formulating its relevant advice for the Australian Government, based on input from the profession.

Background

<u>Legislative framework and reform context</u>

8. It is important not to overlook the context and circumstances by which complaints of discrimination come to be determined by a court. Unlike other proceedings which are commenced in a court, there is a process that must be completed before any applicant can commence a proceeding—namely, the complainant must have made a complaint to the AHRC in relation to the alleged unlawful conduct, which must have been terminated by the President of the AHRC under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).[5] The rationale being that it is preferable to resolve complaints of this kind quickly, cheaply and privately.[6]

9. 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. The AHRC has no power to award costs with respect to any of its functions under Part IIB, Division 1.

[4] Now that the *Fair Work Act 2009* (Cth) provides for sexual harassment complaints to be made in connection with work in Part 3-5A, there is an additional no-cost option for applicants.
[5] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1).
[6] The Law Council acknowledges that, in practice, the expeditious resolution of claims by the AHRC may be hampered by available resources for conciliation, and in some cases by parties' reluctance to engage in early resolution.

10. The AHRC reported for the year 2020–2021[7] that it received 3113 discrimination complaints. The AHRC conducted approximately 1517 conciliation processes, of which 1054 complaints (70 per cent) were successfully resolved.[8]

11. With respect to the outcomes achieved in conciliation, the AHRC said:

> *Information on the outcomes of conciliated complaints under federal anti-discrimination law indicates that 38% of outcomes included terms which will have benefits for people beyond the individual complainant. For example, agreements to introduce anti-discrimination policies and provide anti-discrimination training in workplaces and agreements to undertake modifications to buildings and services to address potential discriminatory factors.*[9]

12. Sixteen per cent (504) were complaints under the *Sex Discrimination Act 1984* (Cth) (**SDA**), of which 252 concerned sexual harassment.[10] The AHRC reported 28 per cent of complaints under the SDA were terminated on the ground that the complaint could not be conciliated,[11] meaning the complainant had the option of commencing a proceeding in the Court without the need for leave to make the application to first be granted.[12]

13. The AHRC reported high rates of resolution, indicative of an effective resolution process. The AHRC also stated that both complainants and respondents reported very high rates of satisfaction with the AHRC's processes.[13]

14. Following the termination of a complaint to the AHRC, an application may be made to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) (collectively, the **Court**), by or on behalf of an affected person, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.[14]

15. Understood in its full context, the complainants who commence a proceeding in the Court represent a relatively small proportion of all complaints made under the AHRC Act. The Law Council notes that not every terminated complaint will result in a proceeding. For example, the statistics recorded by the Federal Court for 2020–2021 show there were 285 proceedings filed for all matters in the administrative, constitutional and human rights national practice area.[15] This practice area is not limited to AHRC Act proceedings. In the Federal Circuit and Family Court of Australia (Division 2), for 2020–2021, 75 proceedings under the AHRC Act were filed.[16]

16. Even when proceedings are commenced in the Court, it is common for the parties to participate in a mediation with a Court registrar. While the Court statistics do not record the success rate of proceedings brought under the AHRC Act, the Law Council understands from the practitioners who frequently appear in these matters, there is a high degree of success through the Court mediation process.

---

[7] Australian Human Rights Commission, *2020-21 Complaint statistics*: <https://humanrights.gov.au/sites/default/files/2022-02/ahrc_ar_2020-2021_complaint_stats.pdf>.
[8] Ibid, 34.
[9] Ibid, 3.
[10] Ibid, 18.
[11] Ibid, 21.
[12] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(3A)(c).
[13] Ibid, 6.
[14] *Australian Human Rights Commission Act 1986* (Cth) ss 46PO(1) and (2A).
[15] Federal Court of Australia, *Annual Report 2021-22*, Appendix 5: <https://www.fedcourt.gov.au/__data/assets/pdf_file/0014/101264/Appx-5.pdf>, 154.
[16] Federal Circuit and Family Court of Australia, *Annual Report 2020-21*, Part 1: <https://www.fcfcoa.gov.au/fcc-annual-reports/2020-21/part-1>.

17. For those matters that proceed to a final hearing, the Court may order costs under discretionary powers in the *Federal Court of Australia Act 1976* (Cth)[17] and the *Federal Circuit and Family Court of Australia Act 2021* (Cth) and *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* and *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Part 26) respectively. While this discretion is broad, the general rule is that costs 'follow the event', meaning that the unsuccessful party will generally be ordered to pay the costs of the successful party.[18] There are exceptions made, for example in litigation involving the public interest, but such departures are approached cautiously by the courts.[19] In some cases, the Court has made a protective costs order that fixes the costs at an early stage of the proceedings.[20]

18. In preparing its Respect@Work Report, 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 Court.[21] 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 Fair Work Act, which authorises a court to order that a party pay 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'.[22]

19. In its 2021 Report *Free and Equal: A reform agenda for federal discrimination laws*, after further consultations,[23] 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.[24]

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 anti-discrimination cases, consistent with the position taken by the AHRC in its Free and Equal Report.[25] However, this Schedule was removed from the version of the bill ultimately enacted by Parliament.

Present consultation

21. The Consultation paper accepts that reform of the costs framework that operates in anti-discrimination matters brought under the AHRC Act is warranted:[26]

> *The current framework of broad judicial discretion does not provide applicants and respondents in discrimination matters at the federal level with sufficient certainty as to how*

[17] *Federal Court of Australia Act 1976* (Cth) s 43 and *Federal Court Rules 2011* (Cth).
[18] See, e.g., Federal Court of Australia, Legal Costs (website, undated)<https://www.fedcourt.gov.au/going-to court/i-am-a-party/court-processes/legal-costs>; Federal Court Rules 2011 (Cth), r 40.03; Federal Circuit and Family Court of Australia, *Legal costs in general federal law matters*: <https://www.fcfcoa.gov.au/gfl/pubs/gfl-costs>; Judicial Commission of New South Wales, Civil Trials Benchbook, 'Costs' (website, March 2021) <https://www.judcom.nsw.gov.au/publications/benchbks/civil/costs.html> .
[19] *Oshlack v Richmond River Council* (1998) 193 CLR 72; *Gupta v City of Port Adelaide Enfield* [2023] FedCFamC2G 127, [116].
[20] See for example, *King v Virgin Australia Airlines Pty Ltd* [2014] FCA 36, *Perkiss v State of New South Wales (Technical and Further Education Commission) (TAFE Illawarra)* [2016] FCA 1165; and *Hudson v Australian Broadcasting Corporation* [2016] FCCA 917.
[21] Respect@Work Report, above n 2, 507.
[22] *Fair Work Act 2009* (Cth) subsection 570(2).
[23] AHRC, *Free and Equal: A reform agenda for federal discrimination laws* (2021), 191-200 (**AHRC Free and Equal Paper).**
[24] Ibid 201.
[25] Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) (first reading) Schedule 5.
[26] Consultation paper, above n 1, 10 (Footnotes removed from original).

costs will be awarded. The risk of an adverse costs order is significant for parties and operates as a clear disincentive to pursuing litigation. … The costs risk associated with litigation therefore continues to represent a significant barrier to applicants… .

22. The Consultation paper seeks views on a number of potential models to reform the costs framework. Briefly, these models (plus the option of leaving the existing model unchanged) are:

    - status quo—the current model, in which costs generally (but need not necessarily) follow the event;
    - hard cost neutrality—represented by the model in place in the Fair Work Act (s 570), under which each party bears its own costs unless the court is satisfied that a claim is vexatious, or a claimant has acted unreasonably;
    - soft cost neutrality—the model represented by most of the state and territory anti-discrimination legislation, with a greater degree of judicial discretion to depart from the default 'no costs' option, as the court considers 'just', having regard to a range of (non-exhaustive) criteria as outlined in the Consultation paper;[27]
    - equal access—an asymmetric cost model adopted in respect of certain whistleblower claims in the Commonwealth jurisdiction[28] in which respondents may be ordered to pay applicants' costs in the event the application is successful, but applicants are protected from adverse costs in the event that their application is unsuccessful and each party would bear their own costs (unless the application is vexatious, or the applicant behaved unreasonably); and
    - applicant choice—a model under which applicants would be able to choose between hard cost neutrality and the status quo.

Discussion

23. The Law Council has previously supported reform of the cost model in Commonwealth discrimination cases, initially in the context of a 2009–2011 proposal to consolidate all Commonwealth anti-discrimination laws into one Act.[29] However, there is no longer a clear consensus among practitioners in support of such a change.

24. In the Law Council's own consultations on this subject, a range of views was presented, and no single model could be said to have attracted overwhelming support.

---

[27] Ibid 26.

[28] *Public Interest Disclosure Act 2013* (Cth) s 18; *Corporations Act 2001* (Cth), s 1317AH.

[29] See eg *Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws*, March 2011, 5 (NB this policy statement is currently under review); Law Council of Australia, Submission to the Australian Human Rights Commission, *Response to Discussion Paper: Priorities for federal discrimination law reform* (20 December 2019) [136]-[139] <https://www.lawcouncil.asn.au/publicassets/ed1dce97-9048-ea11-9403-005056be13b5/3725%20-%20Priorities%20for%20federal%20discrimination%20law%20reform.pdf>; Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (14 October 2022) [6] <https://www.lawcouncil.asn.au/publicassets/cb7ff0f1-cf50-ed11-9475-005056be13b5/4246%20-%20S%20-%20Respect_Work%20Bill%202022.pdf>.

Cost Neutrality

25. The 'cost neutrality' model (in any form) is no longer supported by a majority of practitioners in most jurisdictions.[30]

26. Practitioners, including those with experience of jurisdictions that have adopted a 'cost neutrality' model, consider that the adoption of such a model will present significant access to justice issues, as a result of high-quality representation being less available. A lack of reasonable certainty that applicants will be able to recover costs can affect the ability of would-be applicants, particularly those with low value claims or as members of class actions, to find legal representation. This is especially true for practitioners in this space operating on a 'no win, no fee' basis. Such matters are costly to run, and the firms involved typically have cost recovery factored into their business models.

27. Practitioners are concerned that altering the cost model under federal anti-discrimination law will actually remove an important option for applicants, who presently have a range of cost-neutral alternatives (in the state/territory and Fair Work jurisdictions).

28. The reduced certainty of costs orders in these jurisdictions may also discourage parties from settling matters and further entrench the inequality of arms inherent in most discrimination cases. The Law Council recommends that the Australian Government carefully consider the effect of any proposed change to the cost model on settlement negotiations.

29. The Law Council has also considered that a form of cost neutrality operates in most of the states and territories with respect to their own anti-discrimination regimes.[31] However, a significant difference between the Commonwealth and those jurisdictions is that their relevant laws empower administrative tribunals to provide remedies for discrimination, whereas in the Commonwealth this role is constitutionally reserved for the courts. It is perhaps trite to observe that courts and tribunals have different costs traditions, but if evidence were needed it might be found in the last review of the *Anti-Discrimination Act 1977* (NSW), which recommended a cost neutrality option for the Equal Opportunity Division of the NSW Administrative Decisions Tribunal, but retention of the usual 'costs follow the event' model for NSW Courts deciding discrimination cases.[32] Principally, this recommendation was made because NSW applicants would have the cost-neutral option of the Administrative Decisions Tribunal. However, it was also made in part in deference to the general costs rules of the NSW Supreme Court[33] and Commonwealth courts.[34]

Applicant Choice

30. Similarly, the 'applicant choice' model garnered little support from the profession, not least because it could provide even less certainty than the status quo. In addition, experts consulted by the Law Council noted ethical difficulties associated with properly advising clients of the risks associated with the options involved, particularly where such

---

[30] Practitioners represented by the Law Society of Western Australia still support cost neutrality, as do some (but not all) practitioners represented by the Law Society of South Australia and the Australian Capital Territory Law Society.
[31] Consultation paper, above n 1, 17-20.
[32] NSW Law Reform Commission, *Report 92 (1999): Review of the* Anti-Discrimination Act 1977 *(NSW):* <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-92.pdf>.
[32] Ibid, Recommendations 143 and 144.
[33] Ibid, [9.122].
[34] Ibid, [9.125]. There is of course a parallel to be drawn with the recent Fair Work Act reforms relating to sexual harassment complaints and incorporating a cost neutrality model (that is, complainants in the Commonwealth jurisdiction now have a choice of avenues with different costs models, as do complainants in the states and territories).

a choice may need to be made at the outset of litigation before all relevant information is known.

Equal access

31. Some of the Law Council's Constituent Bodies representing a large number of practitioners, including the Law Society of New South Wales, the Law Institute of Victoria and the Victorian Bar have expressed a preference for an equal access model to address difficulties their members see with the status quo.[35] They see an asymmetric model as desirable to address financial barriers and uncertainty for applicants, particularly in cases under legislation such as the *Disability Discrimination Act 1992* (Cth), in which damages tend to be low. In addition, the work required to apply for a costs order (including costs capping order) under the status quo, for example to argue that a case has been brought in the public interest, may generate further costs and this may be self-defeating. Practitioners suggest that significant time, costs and resources may have to be expended in the making of these applications.

32. Many members of the legal profession support a change to an equal access model on the basis of fairness and access to justice for applicants, as a means to address the significant inequality in power and resources they consider is often present between applicants and their employers or respondents in discrimination and sexual harassment cases. The Law Institute of Victoria, for example, submits that its members report that, given the costs of litigation, it is mainly high value claims or strategically litigated pro bono claims that are brought. It considers that an equal access model would encourage more discrimination matters being brought in the public interest and would empower applicants from marginalised communities, vulnerable backgrounds and those with 'low value' claims.

33. Some proponents also suggest a benefit of more applications being made would be that currently 'undeveloped' anti-discrimination jurisprudence could be further developed, easing the ability of practitioners to advise clients accurately about the merits of their case, or about the appropriate amount of compensation to seek in conciliation thus enhancing certainty and fairness for those making or defending claims.

34. Proponents of an equal access approach see any disadvantages, including potential detriment to less well-resourced respondents and a risk of an increase in unmeritorious complaints, to be overstated, or manageable with careful design. For example, the Victorian Bar proposes that the equal access model could be modified to give the court more discretion to make a different costs order if it would be fair to do so.[36] It does note that this approach would reduce certainty as to how costs are awarded, although it considers it would ultimately result in fairer outcomes.

35. On the latter point, it was pointed out by some Constituent Bodies that the complaints process before the AHRC may assist to prevent unmeritorious complaints from reaching the courts. The President of the AHRC has a duty to terminate a complaint if the complaint is trivial, vexatious, misconceived or lacking in substance[37] or if the President is satisfied that there would be no reasonable prospect that the Federal Court or the Federal Circuit and Family Court of Australia would be satisfied that the alleged acts, omissions or practices are unlawful discrimination.[38] Once a complaint is terminated on

[35] Certain expert committees consulted by the Law Society of South Australia and the ACT Law Society also preferred an equal access model.
[36] It suggested factors similar to those in subclause 46PSA(3) of the Anti-Discrimination Legislation Amendment (Respect at Work) Bill 2022 (Cth).
[37] *Australian Human Rights Commission Act 1986* (Cth) subsection 46PH(1B).
[38] Ibid subsection 46PH(1C).

the above grounds, the applicant needs to seek leave from the court in order to bring an application to it.[39]

36. However, several practitioners have raised that the potential impact of an asymmetrical (equal access) cost model on respondents should be considered. Arguably a premise of this regime is that there is a prevailing inequality of arms tilted towards respondents. However, this is not true in all cases. Practitioners often represent small businesses and even individuals as respondents in discrimination matters, and advise that an asymmetrical model may raise fair trial concerns for such parties. If there is to be a change to the present cost model, the new model should take into account that respondents are not uniformly large and well-resourced.[40]

37. A further concern that these practitioners had is about the risk of unmeritorious complaints; particularly as it may cause further delays in an already slow-moving jurisdiction.

38. Applicants are already protected from adverse costs under other Commonwealth regimes, but these regimes are not necessarily comparable with anti-discrimination law. Section 18 of the *Public Interest Disclosure Act 2013* (Cth) provides that those applying for a remedy against reprisals (after making a protected disclosure) 'must not be ordered to pay costs incurred by another party to the proceedings' (unless the claim was vexatious or plaintiff's behaviour unreasonable). Section 1317AH of the *Corporations Act 2001* (Cth) makes a similar provision in respect of litigation involving reprisals against/victimisation of whistleblowers (e.g., to ASIC or the AFP). However, whistleblower reprisal cases are less common than discrimination cases, and a change to the cost model for the latter could have different consequences. The whistleblower reprisal regime is also still in the relatively early stages of its development.

<u>Status quo</u>

39. In light of the issues raised above with each of the other costs models, a significant number of practitioners on expert committees consulted by both the Law Council and Constituent Bodies have expressed support for maintaining the status quo.

40. In principle, the Law Council agrees that the vindication by individuals of broader public interests (such as the prevention of harassment and discrimination) should attract protection for applicants, so that litigation does not pose an unacceptable financial risk. However, some legal practitioners represent both applicants and respondents in discrimination litigation, and have suggested to the Law Council that the undesirable consequences of a shift away from the status quo (in which costs generally follow the event) outweigh the benefits of doing so.

41. The Law Council acknowledges the Consultation paper's contention that the status quo is less certain for parties than some of the alternative models proposed.[41] However, expert discrimination law practitioners note that there are several factors deterring potential applicants from proceeding to court with discrimination matters, of which the risk of adverse costs is only one.[42] The research report cited in the Consultation paper

[39] Ibid paragraph 46PO(3A)(a).
[40] Further research into the cases being brought (under all of the anti-discrimination Acts) and who is bringing them would be required to form a solid evidence base for reform in this area.
[41] Consultation paper, above n 1, 10.
[42] Other relevant factors cited include the potentially traumatic process of giving evidence, significant delays and typically low damages.

by Thornton, Pender and Castles[43] demonstrates that inadequate settlements and damages are a significant contributor to prospective applicants' apprehension about costs.[44] Court delays are another factor identified in our consultations which might encourage applicants to resolve their claims other than through litigation under the Commonwealth anti-discrimination regime.

42. The Consultation paper, drawing on AHRC data and related reports, notes that 'only a very small number (on average 2–4 per cent) of finalised complaints are the subject of an application to proceed to court.'[45] The paper further notes that 'most sexual harassment cases are settled privately outside of court proceedings.'[46] This is consistent with the publicly available data, described above.

43. As for the status quo being a disincentive to bringing applications, practitioners observed that this is mainly true of claims seeking remedies of lesser monetary value. Claims in which principle and/or the public interest is foremost (including many vilification or racial discrimination claims) often result in costs outstripping awards.[47] This is problematic under any of the proposed cost models. It has been suggested to the Law Council by some practitioners that a model that involves funding for such cases to be run (perhaps in a separate small claims division) could address the disincentive.

44. In addition, some practitioners noted that existing 'cost capping' orders (as mentioned in the Consultation paper) have been very effective and assisted in the running of public interest matters. If research shows that capping orders are used infrequently,[48] perhaps the proposed reform should consider whether the courts might be encouraged to use them more often. The availability of such orders, along with the effect they can have on settlement negotiations, should not be dismissed in assessing the status quo.

45. Practitioners' views accord with the findings of the Thornton/Pender/Castles Report[49]—that awards in discrimination cases are often insufficient to fund the conduct of the litigation. This is seen as a more pressing concern than the applicable cost model.

Other developments

46. There have been many changes in the Commonwealth anti-discrimination jurisdiction since the Law Council previously took a policy position on the most appropriate cost model. Indeed, there have been significant changes since the Respect@Work report was released in 2020 (for example, members have observed a shift in support away from cost neutral state and territory jurisdictions, and damages have been increasing in certain types of discrimination matters).

[43] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study,* December 2022: <https://www.ag.gov.au/rights-and-protections/publications/damages-and-costs-sexual-harassment-litigation-doctrinal-qualitative-and-quantitative-study>.

[44] The Law Council is aware of further research by Castles, Pender and Hvala noting that sexual harassment cases have seen an increase in average damages over the past decade, but this does not affect the cost vs risk calculations that potential applicants must make in other discrimination cases (see Castles, Hvala and Pender, *Rethinking* Richardson: *Sexual Harassment Damages in the #MeToo Era* (2021) 49(2) *Federal Law Review* 231, 238).

[45] Consultation paper, 15.

[46] Ibid, 16.

[47] NB this is less likely in the Federal Circuit and Family Court, where costs are determined by a scale and are generally lower than in the Federal Court.

[48] Consultation paper, above n 1, 10. The Law Council previously submitted that it had been advised that these orders are rarely made: Law Council of Australia, Submission to Attorney-General's Department, Respect@Work Consultation (23 March 2022) [82] <https://www.lawcouncil.asn.au/publicassets/056e0327-5cae-ec11-944c-005056be13b5/4193%20-%20Respect%20Work%20Further%20Legislative%20Recommendations.pdf>.

[49] Above n 43.

47. In addition, the Fair Work regime has recently been updated to provide potential applicants with the option to make sexual harassment claims in a cost-neutral jurisdiction.[50]

48. The Law Council notes that Australia's entire Commonwealth human rights framework is currently under review[51]—a framework which includes the Anti-discrimination Acts.[52] It might be appropriate to revisit this cost issue in the context of that review, because there is at present a lack of consensus among members of the legal profession on the need for change.

Concluding remarks

49. In the time available, this only constitutes a brief analysis of the proposed changes to the cost model for Commonwealth anti-discrimination laws. However, the Law Council hopes that that these comments will inform AGD's consideration of any changes to be made.

50. Should you wish to discuss, please contact Adam Fletcher, Senior Policy Lawyer, at adam.fletcher@lawcouncil.asn.au in the first instance.

Yours sincerely

Luke Murphy
President

[50] Above n 4.
[51] Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework,* announced 15 March 2023: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>.
[52] Australia's 2010 Human Rights Framework appears to be unavailable from official websites, but a copy is available from the NSW Bar Association: <https://nswbar.asn.au/circulars/2010/april/hr.pdf> - the review of anti-discrimination laws came under the 'Respect' aspect of the Framework (at 9).