UNSW SYDNEY

9 January 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
email: legcon.sen@aph.gov.au

Dear Madam/Sir,

Inquiry into the *Australian Human Rights Commission Amendment (Costs Protection) Bill*

Thank you for the opportunity to make a submission to the Inquiry.

Overall Comments on the Bill

Kingsford Legal Centre (KLC) welcomes the intention of the legislation to create an equal access or asymmetrical costs model in discrimination matters.

KLC along with many other community legal centres have long been on the record that the current costs regime in discrimination law matters is a problematic access to justice barrier. We supported the development of an equal access model in our submission to the Attorney General's Department cost review early in 2023[1] and we include that submission with this one for your benefit.

While we provide some suggested amendments and technical feedback on how the Bill could be improved we are strongly supportive of the benefits of the equal access model which we believe are necessary to fully enliven the strengthening provisions created by the *Respect@Work* amendments in 2022. We believe these provisions are an important and necessary step to ensure access to justice is realised and to ensure that people who experience discrimination and harassment are able to enforce their rights. We also outline our responses to some common concerns around the potential operation of the provision.

Recommendations:

1. **KLC recommends that the Bill be passed.**

Other suggested amendments for improving the Bill

2. **The Bill be amended so that successful respondents may be liable for costs incurred by applicants as a result of the respondent's unreasonable act or omission.**
3. **Amend to ensure that the EM terminology around "unreasonable acts or omissions" so that it applies to both section 46PSA(4) and 46PSA (6).**
4. **Amend the Bill to explicitly exclude considerations of offers of settlement in relation to the awarding of costs.**

[1] Australian Government, *Consultation Paper: Review into an Appropriate Costs Model for Anti-Discrimination Laws* (February 2023) 15 ('Consultation Paper').

5. Remove 46PSA6(c)

Why is this reform necessary?

Australia's federal anti-discrimination laws currently present an access to justice problem. This is because very small numbers of matters proceed to Court when we know there are very high rates of discrimination and sexual harassment in the community.[2] The number of litigated cases across all areas of discrimination law in the federal sphere has also decreased over time, suggesting that access to justice has got worse not better.[3] This is of concern when there are high rates of sexual harassment in the community.[4] As highlighted by the Attorney General in his second reading speech:

> The fifth national survey on sexual harassment in Australian workplaces found that 33 per cent of people who had been in the workforce in the preceding five years had experienced workplace sexual harassment.[5]

These statistics also reflect our experience as lawyers and litigators, and the experience of many of our clients, who face significant barriers to bringing federal sexual harassment and discrimination cases.

To eliminate and prevent sexual harassment and discrimination we need to take a holistic approach which includes prevention strategies such as community education and employers holding positive duties to prevent and eliminate sex discrimination including sexual harassment. A holistic approach also must also include meaningful and effective remedies for people who have been harmed by this conduct. Access to the courts is an important part of this preventative and norm setting eco-system.

These reforms do not mean that everyone who experiences sexual harassment and discrimination will litigate their matter in court. We remain committed to the important and expert role of the Australian Human Rights Commission (AHRC) in providing trauma informed, expert, confidential conciliation processes. Most people who bring a claim will continue to have their matters resolved at this stage. This reflects the experience of our clients who generally find court processes stressful and retraumatising.

The problems with the current costs model are now well recognised and a matter of public record.[6] KLC has worked with significant numbers of expert organisations

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[2] As noted in the Consultation Paper at note 1, only 2-4% of all finalised complaints in the Australian Human Rights Commission proceed to Court. Australian Government, *Consultation Paper: Review into an Appropriate Costs Model for Anti-Discrimination Laws* (February 2023) 15; Australian Human Rights Commission, *Free and Equal A Reform Agenda for Federal Discrimination Laws* (Paper, December 2021) 103. The *Respect@Work* Report found that one in three people had experienced sexual harassment at work in the last five years. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, January 2020) 69 ('*Respect@Work*').

[3] Emerita Professor Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Report, 25 March 2022) 27.

[4] During the 2021-22 period, 1.7 million people in Australia had experienced sexual harassment within the previous 12 months. Australian Bureau of Statistics, *Sexual Harassment 2021-22* in *Personal Safety, Australia 2021-22* (Previous Catalogue Number 4906.0, 23 August 2023). *Respect@Work* (n 2) 69.

[5] Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 2023, 8148 (Mark Dreyfus, Attorney-General) available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F27180%2F0016%22 .

[6] For example: *Respect@Work Report: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 5 March 2020) and Emerita Professor Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study*

through the Power to Prevent coalition to highlight the role costs play in preventing people from asserting their rights fully. There is widespread consensus across community legal centres, trade unions and legal aid that the current costs model does not work in the interests of justice.[7]

Under the current model in federal discrimination matters, the Federal Courts have a broad discretion to make costs orders.[8] Generally, these courts follow the practice of awarding costs after the event according to who was successful in proceedings. In practice, this means that the unsuccessful party bears the legal costs of the other party in addition to their own legal costs. The *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*) also specifically enables these Courts to have regard to the rejection of offers to settle in deciding to award costs.[9]

Sexual harassment and discrimination law matters are distinctive as they are proceedings which are instituted by an ordinary individual complainant. These proceedings are, therefore, highly sensitive to the cost of litigation and the risk of costs orders. What this Bill proposes is that for people who have claims that are not resolved at the AHRC to the satisfaction of the applicant, the fear of a costs order and the high cost of litigation will not be the main consideration as to whether a person pursues their rights to the court stage. This is important in ensuring that ordinary individuals have access to the courts and are not barred simply due to the fear that they could be asked to pay the other parties' costs in their matter.

This fear is real and operates to inhibit the effectiveness of the federal discrimination regime, which should be the high-water mark for human rights in Australia. Instead, many of our clients actively avoid the federal jurisdiction in their matters due to the unpredictability and stress of costs orders. This is despite the important reforms to the *Sex Discrimination Act 1984* (Cth) (*SDA*) as part of the implementation of *Respect@Work*. It is therefore important to get this right - to properly implement the *Respect@Work* recommendations and recognise the role that public interest litigation plays in driving cultural change.

KLC and our community legal centre (CLC) colleagues across Australia have known for many years that this costs risk is a significant deterrent for our clients litigating federal discrimination matters. Many CLC clients are considered 'judgment proof' on costs given their limited assets or savings. However, this is not always the case, particularly for working women who have a lifetime of earning capacity ahead of them. Concern about costs and the fear that applicants may be liable to pay an unspecified amount for legal costs is a huge driver of client decision making. Because of this huge disparity in risk between individuals facing amounts that could bankrupt them versus the resources of respondents, (most often companies and corporations), many people do not enforce their rights. This is a problem for human rights in Australia.

We also now have empirical evidence to support the experience of many CLCs on costs. The cost risk is a <u>real</u> risk for many applicants and has become worse in the past two

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(Report, 25 March 2022). Australian Human Rights Commission, *Free and Equal A Reform Agenda for Federal Discrimination Laws* (Paper, December 2021).

[7] Over 80 human rights, community legal centres, trade unions and legal assistance providers endorsed a statement calling for equal access in Australia as part of the Power to Prevent coalition – see https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/consultation/view_respondent?uuId=421918623.

[8] *Australian Human Rights Commission Act 1986* (Cth) s 46PO; *Federal Court of Australia Act 1976* (Cth) s 43; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 214.

[9] *Australian Human Rights Commission Act 1986* (Cth) s46PSA.

decades. Since 2001, applicants have been ordered to pay costs in 52% of sex discrimination cases, 55% of disability discrimination cases, 47% of race discrimination cases, and 50% of age discrimination cases.[10] In sexual harassment matters applicants have been ordered to pay the respondents costs in 56% of cases where the applicant was unsuccessful.[11] Concerningly, in 10% of cases, successful applicants have also been ordered to pay the costs of respondents.[12] In reality, the costs risk is live for our clients beyond 'costs follow the event' and even when they succeed there is a costs risk. This points to a system that is not working and is in need of the change proposed in the Bill.

The current system is not helping the public interest to reduce discrimination and sexual harassment for all people in Australia. People should not face this level of risk in enforcing their rights and upholding community expectations about discrimination and sexual harassment.

Clients make decisions that reflect their perception of risk, and risk to their future life and lifestyle and that of their families. Legal costs now have no connection to ordinary wages or future earnings. As a result, they can bankrupt an average worker and have a devastating impact on their life going forward. Seen in this context, clients make decisions around costs risk for entirely rational reasons. The current cost model does not provide enough protection for clients to make decisions about their case removed from the fear of costs being ordered.

Why is 'equal access' the right balance?

These types of legal action are human rights actions and are therefore inherently in the public interest. It is important in this context that access to these actions needs to be accessible to an ordinary person, recognising that people who are disproportionately impacted by discrimination experience socio-economic disadvantage[13]. Having accessible courts for the enforcement of human rights is important to ensure that rights are realised and that we develop cultures which stamp out unlawful conduct.

This Bill provides the right balance between increasing access to justice and providing mechanisms to ward against vexatious cases. These safeguards include:

- access to AHRC conciliation processes before matters are initiated in court;
- the ability of the AHRC to terminate complaints under section 46PH;
- the Bill allows for costs to be ordered in cases which are vexatious or without reasonable cause.

Why not a 'hard' or 'soft' costs model?

At the time of the *Respect@Work* consultations by former Commissioner Jenkins, KLC supported a cost neutral position similar to section 570 of the *Fair Work Act 2009* (Cth) (*FW Act*). At the time this presented a better option for community legal centre clients than the operation of 'costs follow the event' at the federal level. Since that time the AHRC also moved their thinking to develop a 'soft costs' position in 2021 which tried to address the growing access to justice concerns of hard neutrality.[14] This 'soft costs'

[10] Thornton, Pender and Castles (n 3) 39.
[11] Ibid 34-38.
[12] Ibid 42.
[13] *Respect@Work* (n 2) at 19 and 902.
[14] Australian Human Rights Commission (December 2021) Free and Equal: A reform agenda for federal discrimination laws ('Free and Equal Paper').

position was in the *Respect@Work Bill* [15]. KLC and many other organisations including did not support this provision in the Bill. Our evidence is on record with the Committee as to why the provision was not sufficient to meet the requirement to provide access to justice for applicants.

Our concerns around costs neutrality includes:

- that it requires legal fees (including counsel) to be paid for from damages pay outs which we know in discrimination claims are often low or insufficient to justify taking action. [16] Damages for non-economic loss are “exponentially higher” in defamation than in discrimination highlighting the particular risks of discrimination litigation compared with other types.[17]
- it cost shifted inappropriately by asking the legal profession in many cases to act *pro bono* without an ability or certainty to recover even when matters succeeded.
- it provided less incentive to respondents to avoid litigation and to make meaningful offers and engage in conciliation processes.
- It did not adequately address power and resourcing imbalances which are a distinctive feature of discrimination cases.
- it had the ability to reduce access to legal services for people who have experienced discrimination by removing the ability of private lawyers and counsel to recover their fees and therefore undertake this type of work.

As a result, a prevailing view has emerged that an equal access model should be implemented instead. The submissions to the Attorney General’s Department cost review early in 2023 also were overwhelmingly in favour of this change.[18] KLC as part of the Power to Prevent Coalition along with 85 organisations supported a call to an equal access model as part of that consultation.[19] These provisions are already in operation under whistleblower laws and in other jurisdictions and better address power imbalances without reducing access to legal service for applicants.[20]

We believe the provision meets the public policy objectives of recommendation 25 and has been subjected to proper and rigorous consultation with organisations with direct knowledge of the area.

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[15] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill* 2022 s46PSA.

[16] Thornton, Pender and Castles (n 3) identify the very low damages in discrimination matters generally at pages 17- 32.

[17] Ibid 50.

[18] Australian Government, *Consultation Paper: Review into an Appropriate Costs Model for Anti-Discrimination Laws* (February 2023) 15; Australian Human Rights Commission, *Free and Equal A Reform Agenda for Federal Discrimination Laws* (Paper, December 2021) Published responses: https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/consultation/published_select_respondent.

[19] Power to Prevent Joint statement – see https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination.

[20] See *Corporations Act 2001* (Cth), Part 9.4AAA s 1317AH which adopts an asymmetric cost model as part of a set of measures which offer whistleblower protection. Asymmetric cost models have been adopted in the United States. For example, when the Equal Employment Opportunity Commission in the United States makes a finding that someone was discriminated against in the course of their employment, then the applicant is generally entitled to recover costs. Australian Government, *Consultation Paper: Review into an Appropriate Costs Model for Commonwealth Anti-Discrimination Laws* (February 2023) 21.

Further technical feedback:

Respondent's unreasonable conduct

Section 46PSA(6) provides that an applicant may be liable for costs where their unreasonable act or omission has caused the respondent to incur those costs (regardless of the outcome of the litigation). The same rule should apply to respondents.

We recommend that the Bill should contain a provision to the effect that a successful respondent may be liable for costs where their unreasonable act or omission has caused the applicant to incur those costs. This is consistent with the costs provisions in the *FW Act*.

We propose the following wording be included in the Bill:

> *S46PSA(x) Where the respondent is successful, they may be ordered to pay costs to the applicant if the court is satisfied that the respondent's unreasonable act or omission caused the applicant to incur the* costs.

Recommendation 2

The Bill be amended so that successful respondents may be liable for costs incurred by applicants as a result of the respondent's unreasonable act or omission

- **Section s46PSA(4) - Unreasonable act or omission**

We welcome the detail in the explanatory memorandum (EM) about what constitutes unreasonable act or omission. It is important that the EM acknowledges that the mere refusal of a settlement offer or to participate in a conciliation should not meet this threshold.

For unreasonable acts or omissions, the EM contains guidance in relation to the phrase as used in s46PSA(4), but not in relation to the phrase as used in s46PSA(6) - it needs to be clear that the guidance in the EM applies to both subsections.

We support the view of the Australian Discrimination Law Experts Group (ADLEG) that it would be better to expressly exclude offers of settlement and compromise in relation to the awarding of costs. We agree that the Bill could be amended to include this at s46PSA(5).

Offers of compromise and Calderbank offers are a commonly used strategy by respondents who have access to legal advice and the resources to make these offers. These offers can operate to further exacerbate power and financial imbalances. It can also be the case that applicants may not have ready access to legal advice when they receive these offers and be aware of their significance. It is also commonplace that these offers are made on the basis of strict confidentiality, or non-disclosure agreements and an applicant may not wish to such to agree to such 'gag' clauses. This should not potentially expose them to costs on the basis that this was unreasonable behaviour.

In the context of limited case law and low damages in discrimination law, settlement offers can also operate to stifle the jurisdiction and the development of public interest

litigation. They are not appropriate in human rights matters where the applicant has been personally affected.

It is for these reasons that we do not support the AHRC's submission that s46PSA be amended to include the unreasonable rejection of settlement offers. We believe this would operate oppressively on individual applicants which is not appropriate in a human rights jurisdiction.

Recommendations 3 and 4:

> **3. Amend to ensure that the EM terminology around "unreasonable acts or omissions" applies to both section 46PSA(4) and 46PSA (6).**
> **4. Amend section 46PSA (5) to explicitly exclude considerations of offers of settlement in relation to the awarding of costs.**

- **Section 46PSA(6)(c) - when costs can be awarded against the applicant:**

Section 46PSA(6)(c) provides further exceptions as to when the 'equal access' model applies.

Our view is that this provision should not be included in the Bill. We believe this is too broad an exception to the equal access model and potentially creates further stratification of the system and justice outcomes depending on the type of respondent.

We also think the criteria in 46PSA(6)(c) is too broad and unclear and could result in too many exceptions to equal access, this would render the overall changes ineffective. We think this enlivens the cost risk for applicants and could deter people from bringing claims - what the Bill is attempting to improve.

Recommendation 5:

> **5. Remove the exception contained in section 46PSA(6)(c)**

Addressing potential concerns with the Bill:

- **Doesn't the risk of costs ensure unmeritorious cases don't go to court and prevents court time being wasted?**

In a word, no.

In our experience, the threat of costs (if matters are not resolved at the AHRC stage) creates further imbalances in the federal discrimination law system. As a matter of practicality, many respondents know that applicants generally do not have the financial resources to fund litigation at the federal court stage and are also quick to remind them of the risk of costs at this stage. It is in this context that all conciliations at AHRC occur – with applicants bearing the onus of proving their case and also the prospect of costs occurring if the matter is not settled at AHRC. As a result, in our experience, many respondents don't meaningfully engage in conciliations and offer token amounts of compensation or nothing at all. The lack of robust case law at the court level also stymies settlements at this stage as applicants often have little guidance on what a court might determine.

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This creates problems in sexual harassment and discrimination matters where the resourcing of the parties generally is highly disparate. In the types of matters that *Respect@Work* highlighted this involves many low to medium income earners bringing actions against far better resourced respondents. A risk of a costs order is also a real disincentive for people at all stages of their working lives – for older people it can risk their financial security in retirement, and for young people a costs order can be enforced against them for years to come, following them around as their income earning increases. In these circumstances it is understandable as to why a risk of costs deters people, even if they have advice that their case is arguable.[21]It is the position now that 'good' claims don't get run because of the costs risk. For low to medium income earners there is also increased risk as damages are likely to be lower than higher income earners and therefore increase risk that costs might outstrip damages even when a case is successful.[22] This entrenches what Thornton et al describe as a "major social divide" where there are huge distinctions in cases run by 'white collar" executives versus more marginalised workers.[23] This is troubling in the context and aims of discrimination law.

This has led to the 'invisibility' of sexual harassment and discrimination claims even when the research suggests very high levels in Australia[24]. As Thronton et al state after reviewing all available caselaw in the federal, state and territory jurisdictions:

> The report has shown that damages and costs are inherently linked. It remains the case that pursuing a sexual harassment claim requires significant time, resources and money. Damages awarded by courts remain low, and costs will frequently exceed any award. If a complainant is unsuccessful, they face the risk of having to pay the respondent's often very significant costs. As such, in order to justify the significant costs involved in commencing and maintaining a sexual harassment claim, a settlement or award of damages must be large enough to sufficiently compensate the complainant and cover their legal costs; or costs must be paid by an unsuccessful respondent. In the absence of a sufficiently-large quantum or a costs-order, even a 'successful' complainant can end up significantly out of pocket. For sexual harassment complainants, pursuing justice through the anti-discrimination system often comes with a high price tag.[25]

It is also important to remember that costs in this context are generally in the tens of thousands to hundreds of thousands of dollars – amounts that are financially devastating to most people.

- **But if you have a good case then you shouldn't be worried about costs.**

There are several issues with this type of thinking.

Firstly, discrimination law is highly technical, and it can be hard to know with certainty whether a case is strong or not. This is a problem for applicants (the person who experienced the discrimination) as they must prove their case under discrimination law. There are many technical legal "traps" for applicants in discrimination law that make it

[21] Thornton, Pender and Castles (n 3) 90 and 101.
[22] Ibid 79.
[23] Ibid 6.
[24] *Respect@Work* (n 2) 17.
[25] Thornton, Pender and Castles (n3) 15.

hard to know with complete certainty that you have a slam dunk of a case. This includes:

- the use of a 'comparator" test in discrimination law. Under the SDA a person must show they have been treated less favourably in circumstances that are not materially different[26]. Determining the comparator and whether there is a 'real' or 'imagined' comparator is central to whether people have a case, yet it can be unclear and technically difficult to know who the comparator is.[27]
- the lack of caselaw guidance – there has been a real lack of cases going to the courts over time (due to these cost barriers), so it is harder to advise applicants with certainty about their prospects. In some areas the law is uncertain – so it's hard to predict outcomes and this can increase the 'risk' of going to court.[28] The impact of costs orders has also skewed the caselaw to reflect higher paying industries making it harder to advise in other contexts.[29]
- even if you have a good case, damages in discrimination law cases are low – so you might not get enough to cover your own legal costs – so the cost benefit analysis versus risk might not seem worth it.[30]
- litigation is stressful and highly technical and long running – the impact of this plus a costs risk can easily seem not worth it to ordinary people who are not expert litigators and who generally find enforcing these rights incredibly stressful and impactful on their health.
- as an applicant you might not have all the material and documents you need to prove your case – this can make it hard to know for certain how strong your case is when you file your matter – for example proving you were discriminated at work might require other documents about how other employees were treated and you may not have this material when you have to decide to file in court, increasing the potential 'risk' of your case.
- as an applicant, in most cases you are looking for representation on a deferred fee basis from a private law firm, or from legal aid or community legal centre. You are not able to control the costs of the respondent. Respondents generally have access to more resources. There is no real effective way of you limiting costs as an applicant except by ending your case.
- even when applicants win, there is evidence that they often have costs orders made against them - the research of Thronton et al, shows that even when applicants win they are ordered to pay the respondents costs in 10% of cases.[31]Sometimes even winning your case does not remove the cost risk.

- **Isn't it good to disincentivise matters going to court, and encourage people to use conciliation processes?**

We agree it is important to have options that allow for confidential settlements through the AHRC and we would anticipate that the vast majority of matters will continue to be resolved this way.[32] However, when we think about the ecosystem needed to prevent discrimination and harassment, courts play an important role in reminding everyone of the law and publicly enforcing the law. If matters almost never are aired in court this can

[26] Section 5(1)(c) *Sex Discrimination Act* 1984 (Cth).
[27] Colin Campbell and Dale Smith, 'Direct Discrimination without a comparator? Moving to a test of unfavourable treatment' (2015) 43(1) *Federal Law Review* 91, 92.
[28] Thornton, Pender and Castles (n 3) 28.
[29] Ibid 6.
[30] Ibid 120.
[31] Ibid 31.
[32] Consultation Paper (n 1). As noted in the Consultation Paper, only 2-4% of all finalised complaints in the Australian Human Rights Commission proceed to Court.

lead to the proliferation of harmful behaviour that *Respect@Work* documented. These types of cases are public interest cases and benefit the community more generally. The fact that court is often not a realistic option undermines the effectiveness of conciliations at AHRC.

One of the shocking aspects of the *Respect@Work Report* was that it found sexual harassment to be endemic in Australia.[33] If we look at cases going through the courts we do not see this reflected in matters before the court. The recent study conducted by Thornton et al[34] identified a total of 1,141 cases in relation to age, sex, disability, race and sexual harassment across the State and Territory jurisdictions from 1984 to the end of 2021, being an average of 31 such cases per year across these jurisdictions. These figures are very low when we know the experience of discrimination and sexual harassment to be much higher. This research also noted the steady decline over time of matters going to final decision at court, suggesting access to justice has declined in this area.[35]

Matters going to court raise awareness to the community as to the legal standards and they make real the duties contained in the law. A lack of visibility of the unlawfulness of this behaviour has contributed in part to its endemic nature.

We do not want to see all matters going to court, or the courts being overwhelmed with matters. This is very unlikely to occur except in a very small minority of cases.

We do need more matters to go to court if they cannot be settled and have reasonable prospects, in order to improve standards, develop the law, make real the legal obligations contained in the law and clarify what the law means. Whenever there is a pathway to court there is a risk of vexatious matters but the Bill deals with this effectively (see further below) and this cannot be the rationale for not increasing access to justice for the majority.

- **'Doesn't this undermine the conciliation jurisdiction of the Australian Human Rights Commission?'**

In our experience, the majority of people who have experienced sexual harassment and discrimination, want and value a confidential conciliation process and an ability to settle the matter without going to court.

Processes at AHRC also have the attraction for applicants that they can also come up with more bespoke settlement terms. The majority of our clients want to ensure that settlements include some future measures to prevent the conduct occurring again, and settlements at AHRC can include non-monetary outcomes such as training or policy updating. We think these processes and the reality that most applicants do not want the stress and delay of going to court mean that AHRC will still be an attractive place for applicants to settle.

There will still be very real resourcing constraints for individuals who want to bring their matter to court, in that there are more limited options for representation at this stage. Because of the time intensive nature of this litigation, CLCs like KLC must carefully consider the merit of cases it acts in at court stage. Applicants reliant on the legal assistance sector often will not have guaranteed representation at the court stage also

[33] *Respect@Work* (n 2) 69.
[34]Thornton, Pender and Castles (n 3) at 28.
[35] Ibid 20-21.

meaning that applicants are unlikely to consider the AHRC stage as simply something they do before going to court.

We disagree with the AHRC's view that there will be less incentives to resolve matters at conciliation stage of the AHRC. There remain many incentives to settle at the AHRC including:

- it is a confidential, trauma-informed process that allows applicants to speak of the impact of the conduct on them - this process can have positive impacts on our clients can be restorative and genuine engagement can lead to settlements in even very difficult cases.
- the ability to agree to bespoke, non-monetary outcomes provides greater flexibility than decisions of the court – this can include changes to policy, training, statements of service and letters of apology – this is often important to applicants.
- representation for most applicants at the court stage is harder to secure than at AHRC stage and CLCs like KLC can take on very few cases and so must choose matters of merit. It is unlikely KLC would act at court stage if reasonable offers of settlement have been made at the AHRC stage. The uncertainty of representation at court will mean that most applicants will engage at the AHRC conciliation in the hope their matter can be concluded successfully.
- court processes are uncertain, stressful and exacerbate harm – very few applicants want to go to court without very strong reasons.
- court processes further delay settlement so are often not preferred due to the further delay in resolution.
- unsuccessful applicants bear their own costs risk so this may be too much of a risk for some applicants even under equal access.
- the public nature of court proceedings can be a disincentive for people.

We think the potential impact on the AHRC conciliation jurisdiction is that respondents will more meaningfully engage with the conciliation stage and provide better settlement offers to cases of merit at this stage. This would include offering better non-monetary outcomes as well as monetary outcomes.

In our experience, objectively strong cases currently do not settle at the conciliation stage at AHRC because respondents know that applicants are unlikely to push onto the court stage due to the costs risk. The risk of legal costs is a live issue in AHRC conciliations. In our view the jurisdiction of the AHRC is undermined by the current costs regime as our clients choose less favourable jurisdictions for their matters (Anti-Discrimination NSW and the Fair Work Commission) due to the costs risk federally.

- **Why does this Bill apply to sexual harassment <u>and</u> discrimination matters?**

Respect@Work found strong correlations between sexual harassment and other types of discrimination.[36] This is why recommendation 25 related to all types of discrimination and sexual harassment.

To limit this costs regime only to sexual harassment matters would make the law more complex and difficult to navigate. The same fear of costs drives decisions in all types of discrimination matters, and damages in other types of discrimination matters are lower than in sexual harassment, meaning it can be even less worthwhile taking matters to

[36] *Respect@Work* (n 2) 10.

court[37]. There are many important public policy reasons in areas such as disability discrimination where we also need to see the same norm setting and clarity around the law through having matters going to court. It is desirable that we correct both the lack of matters going to court across all types of discrimination in order to improve the realisation of human rights in Australia.

- **What about the impact on small to medium respondents – not everyone has deep pockets:**

There are particular features of discrimination law which means it's appropriate that we depart from the normal rule of 'costs follow the event' which is more suited to other types of commercial matters. These are:

- discrimination law is important human rights law and is brought by individuals who have less resources than companies, or other bodies to bring litigation.
- people who experience discrimination and sexual harassment are more likely to experience socio-economic disadvantage and have less financial resources to fund litigation costs.
- this type of litigation is in the public interest and there are benefits overall to the community from the litigation.
- equal access applies where an applicant is successful. If the claim fails both sides bear their own costs (which is the same as 570 of FWA).

The vast majority of respondents will be companies and organisation who are able to mitigate and mange their risk through good processes, policies, access to legal advice and insurance. However, there are safeguards and mechanisms for small to medium sized respondents who may be exposed to costs risk under the Bill. These are:

- the AHRC retains its conciliation jurisdiction, and we would anticipate that the vast majority of cases will continue to be settled at this stage without recourse to the Courts or any cost risk.[38]
- the costs of applicants are generally going to be lower than what applicants are currently exposed to under the current model. This is because individual applicants generally will engage less legal services than respondents who generally have greater financial resources. There is a better balancing of costs under equal access.
- there are safeguards in the Bill to allow respondents to recover costs – in particular:
    - s46PSA6(a) allows a respondent to recover costs in vexatious or proceedings without reasonable cause.
    - s46PSA6(b) if they incur costs due to the applicant's unreasonable act or omission caused them to incur costs.
- The AHRC Act also has provisions to protect including:
    - claims terminated under s46PH also must proceed with the leave of the Court (s46PO) *AHRC Act;*
- respondents can also apply for proceedings to be struck out under Federal Court Rule 16.21;

These provide good safeguards for small to medium respondents who may not be as financially resourced as other types of respondents.

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[37] Thornton, Pender and Castles (n 3) 84.

[38] Consultation Paper (n 1). As noted in the Consultation Paper, only 2-4% of all finalised complaints in the Australian Human Rights Commission proceed to Court.

It is important to remember that costs become a live issue if the applicant succeeds in proving that unlawful discrimination has occurred. It is appropriate that there are consequences from this type of conduct.

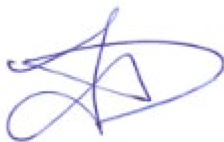
Conclusion

KLC welcomes and supports this Bill and the development of an equal access model in discrimination law in Australia. This amendment is important to seriously address the concerns that the *Respect@Work* laid bare. We commend the Government for their consultation with organisations like KLC that work directly with people affected by discrimination and harassment.

Notwithstanding our recommendations on technical improvements, we support the passage of this Bill.

Yous sincerely,
KINGSFORD LEGAL CENTRE

Emma Golledge
Director



Fiona Duane
Senior Solicitor, Sexual Harassment and Discrimination Legal Service

Encl.

Kingsford Legal Centre Submission to Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws (April 2023)

14 April 2023
Proper Officer
Australian Government Attorney-General's Department
email only: RespectatWork@ag.gov.au and via portal
Dear Proper Officer,

Submission on Consultation Paper
Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws (2023)

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make this submission on the Consultation Paper: Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws (February 2023) **(the Paper).**

We consent to this submission being published. For all case studies in this submission, names and identifying information have been changed to protect confidentiality.

This submission has been endorsed by Community Legal Centres (CLCs) from across Australia, as set out at the end of this submission**.** We thank these Centres for their collaboration on this submission and endorsement of it.

About Kingsford Legal Centre

KLC is a community legal centre, providing free legal advice, casework, and community legal education to people in south-east Sydney. We have been providing specialist discrimination law advice to people since 1981.

Today we continue to specialise in discrimination law and run a state-wide Discrimination Law Clinic. In 2022, we gave 189 discrimination advices, and provided intensive assistance, including representation with 60 discrimination matters. We provide advice and representation in all discrimination jurisdictions, including the Fair Work Commission, Australian Human Rights Commission, Federal Court, Federal Circuit Court, Anti-Discrimination NSW, and the NSW Civil and Administrative Tribunal.

KLC has a specialist Employment Rights Legal Service (ERLS)[39] and Sexual Harassment Legal Service Clinic (SHLS). These clinics provide free legal help and assistance to people experiencing social and economic disadvantage and barriers to justice. KLC is part of the UNSW Sydney Faculty of Law & Justice and provides clinical legal education.

Overview

Australia's federal anti-discrimination laws are an access to justice problem. This is because very small numbers of matters proceed to Court when we know there are very high rates of discrimination and sexual harassment in the community.[40] [41] The number of litigated cases across all areas of discrimination law in the federal sphere has also

[39] ERLS is a collaborative partnership between KLC, Inner City Legal Centre and Redfern Legal Centre
[40] As noted in the Consultation Paper, only 2-4% of all finalised complaints in the Australian Human Rights Commission proceed to Court.
[41] Australian Government, *Consultation Paper: Review into an Appropriate Costs Model for Anti-Discrimination Laws* (February 2023) 15 ; Australian Human Rights Commission, *Free and Equal A Reform Agenda for Federal Discrimination Laws* (Paper, December 2021) 103.

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decreased over time, suggesting that access to justice has got worse not better.[42] This reflects our experience as lawyers and litigators, and the experience of many of our clients, who face significant barriers to bringing federal sexual harassment and discrimination cases.

Recommendations:

Recommendation 1: An Equal Access Costs Model in discrimination matters

Recommendation 2: Objects Clause on Public Interest Nature of Discrimination Laws

Recommendation 3: Statutory Review Period for Amending Legislation

Recommendation 4: Increased Legal Funding for Legal Aid Assistance Sector

In this submission, we focus on the key barriers for our clients under the current costs model, which is described as 'costs follow the event'. We also discuss the potential impacts for our clients with other proposed costs models for federal discrimination matters, including a costs neutrality with discretion model, an 'applicant choice' model and the section 570 of the *Fair Work Act 2009* (Cth) (FWA) model.

In this submission we recommend an Equal Access (asymmetrical) costs model for all applicants in federal sexual harassment and discrimination law cases.

In our view, this model is the only model that protects applicants to enforce their legal rights, but also enables them to access legal representation. This was the position of the Centre at the time we provided evidence at the Senate Inquiry on the Anti-Discrimination and Human Rights Legislative Amendment (Respect at Work) Bill 2022 and our position remains unchanged.[43]

We also recommend other ancillary reforms to enable this Equal Access model to be effectively implemented. These include reforms to ensure that discrimination proceedings are clearly understood in the law to be public interest proceedings, to ensure any Equal Access model is effectively reviewed by Parliament and to ensure adequate funding to the legal assistance sector, including on the proposed new costs model.

Problems with current costs model in federal discrimination matters:

The problems with the current costs model are now well recognised and a matter of public record.

Under the current model in federal discrimination matters, the Federal Courts have a broad discretion to make orders.[44] Generally, these Courts follow the practice of awarding costs after the event according to who was successful in proceedings. In practice, this means that the unsuccessful party bears the legal costs of the other party in addition to their own legal costs. The *Australian Human Rights Act 1986* (Cth) also specifically enables these courts to have regard to the rejection of offers to settle in deciding to award costs.[45]

KLC and our CLC colleagues across Australia have known for many years that this costs risk is a significant deterrent for our clients litigating federal discrimination matters. Many CLC clients are considered "judgment proof" on costs given their limited assets or savings. However, this is not always the case, particularly for working women who have a lifetime of earning capacity ahead of them. Concern about costs and the fear that clients may be liable to pay an unspecified amount for legal costs is a huge driver of client decision making. This is also the case for clients who may be considered to be "judgment proof", with limited assets or earning capacity into the future. Because of this huge disparity in risk between individuals facing amounts that could bankrupt them

[42] Emerita Professor Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Report, 25 March 2022) 27.

[43] Kingsford Legal Centre, Submission No 21, *Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) 2022 Bill* (12 October 2022) 9.

[44] *Australian Human Rights Commission Act 1986* (Cth) s 46PO; *Federal Court of Australia Act 1976* (Cth) s 43*; Federal Circuit and Family Court of Australia Act 2021* (Cth) s 214.

[45] *Australian Human Rights Commission Act 1986* (Cth) s46PSA.

versus the resources of companies and corporations, many people do not enforce their rights. This is a problem for human rights in Australia.

This is why for many years, and as far back as the consolidation of discrimination law (*Equality Act*) consultations in 2011 and 2012, KLC and Community Legal Centres Australia have advocated for costs reform in this area. We also now have empirical evidence to support the experience of many CLCs on costs. The cost risk is a real risk for many applicants and has become worse in the past two decades. Since 2001, applicants have been ordered to pay costs in 52% of sex discrimination cases, 55% of disability discrimination cases, 47% of race discrimination cases, and 50% of age discrimination cases.[46]

Concerningly, in 10% of cases, successful applicants have also been ordered to pay the costs of respondents, such as for portions of unsuccessful complaints, or based on having refused higher settlement offers than what they were ordered in Court.[47] In reality the costs risk is live for our clients beyond 'costs follow the event' and even when they succeed there is a costs risk. This points to a system that is not working.

The current system is not helping the public interest to reduce discrimination and sexual harassment for all people in Australia. People should not face this level of risk in enforcing their rights and upholding community expectations about discrimination and sexual harassment.

Throughout this submission we speak about "the risk of legal costs", but when we speak to our clients they want to know "*what dollar amount is the worst-case scenario*?". While outside the confines of this submission, legal costs can be extraordinarily high, especially in the Federal Court jurisdiction. It is hard to answer our clients' questions about costs with any real certainty – in some cases it could be in the tens of thousands and in other cases, hundreds of thousands of dollars.

Clients make decisions that reflect their perception of risk, and risk to their future life and lifestyle and that of their families. Legal costs now have no connection to ordinary wages or future earnings. As a result, they can bankrupt an average worker and have a devastating impact on their life going forward. Seen in this context, clients make decisions around costs risk for entirely rational reasons. While different lawyers may provide differing advice on merit or their confidence in obtaining a favourable result for the client, the current cost model does not provide enough protection for clients to make decisions about their case removed from the fear of costs being ordered. We need to address this in any new model.

- ***Financial disincentive to litigation for many applicants***

A key issue with the current costs model where costs follow the event is that it deters too many applicants from pursuing litigation, particularly people who are socio-economically disadvantaged. There is no certainty in any litigation. However, Australia's federal discrimination laws are particularly technical and arguable, which creates significant uncertainty for many of our clients. The lack of litigation in this area also makes litigation more unpredictable and difficult to advise on. We do not have well established case law across all areas of discrimination law, with high numbers of settled cases. For example, research by the Australian Human Rights Commission indicates that 62% of discrimination cases are resolved in conciliation.[48] While resolving complaints through conciliation can provide good outcomes for parties, it means that there is limited case law to advise clients on in our daily practice and the law in this area has been slow to evolve.

There are also distinctive elements to discrimination law that make litigation more difficult or risky than other kinds of litigation. The continued use of a comparator, which is often hypothetical, creates uncertainty for outcomes when the characteristics

[46] Thornton, Pender and Castles (n 4) 39.
[47] Ibid 42.
[48] Australian Human Rights Commission, *Complaint Statistics 2021-2022*, 10.

imputed to the comparator are critical to whether cases succeed or fail. This test is complex and highly factually dependent.[49] Issues with the comparator test have been particularly highlighted in recent years under federal disability discrimination law.[50] The *Respect@Work Report: National Inquiry into Sexual Harassment in Australian Workplaces (Respect@Work Report)*[51] also highlighted the particular disadvantage that many sexual harassment applicants face in court, with verbal forms of sexual harassment being among the most common types of sexual harassment in workplaces, and often occurring in the absence of co-workers or other witnesses.[52] This creates a particular risk in litigation for these applicants, who may lack corroborating evidence for their case, or lose their case if respondents are found to be more credible than them. For many of our clients, the risk of losing in the Federal Courts and being liable to pay the legal fees of respondents is a major financial deterrent from litigating their discrimination cases in this jurisdiction.

As these reforms are being pursued in the context of implementing the *Respect@Work* Recommendations, it is also important to recognise the unique risks for working people and women especially, who may have some assets, or hope to increase their earning capacity in the future. A risk of a costs order, which can be pursued as a debt into the future can be a real concern for working women. Most women who experience sexual harassment at work are not "judgment proof" and therefore, must consider very seriously the risk of a costs order against them. This barrier is also compounded by other stressors in the lives of applicants, including the continuing impact of the discrimination, limited support networks, and their focus on trying to re-build their life. As *Respect@Work* highlighted there is a high mental and physical toll to experiencing sexual harassment and discrimination. We need to build access to justice systems that acknowledges this.

Julia's story provides a particularly powerful example of how the cost risk on top of the life circumstances of applicants can prevent our clients from bringing federal discrimination complaints.

Case Study 1

In March 2021, Julia* started working as a bartender at a restaurant in rural NSW. Julia was sexually harassed by her manager on multiple occasions during her employment, including comments of a sexual nature and physical assaults. To stop the behavior, Julia felt she had no choice but to resign a few months later.

These experiences caused Julia significant psychological harm. To compound the issue, major flooding in Julia's region resulted in her home being destroyed. Julia sought assistance from KLC with lodging a sexual harassment complaint. Without a job and a house, and only slowly getting better and rebuilding her life, Julia was not prepared to risk lodging a complaint in the AHRC for fear that she would be up for an adverse costs order if she wanted to take her matter further in court.

**Client's name changed to protect confidentiality*

As this case study highlights, people who experience discrimination are making complex decisions around the cost implications of their actions at very preliminary

[49] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 35.
[50] Australian Human Rights Commission (n 6) 282.
[51] *Respect@Work Report: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 5 March 2020)
[52] Ibid 124-125.

stages. KLC gives this advice so that clients can weigh up all their options. Costs form a very large part of client decision making and are a key factor, if not *the* key factor, in many cases which prevent them from pursuing federal discrimination law complaints. While it is desirable that not all discrimination matters proceed to court, the lack of matters that have been pursued to hearing in the federal jurisdiction is troubling. This is because of the important role of court cases in norm setting and reminding the community about their enforceable rights and the obligations of employers. Having some matters proceed to Court allows the law to develop and creates greater certainty about legal duties and obligations. It should be considered desirable that there is an increase in litigation in this area, especially when seen in the context of very high levels of sexual harassment and discrimination in the community. Matters proceeding to court form part of a complex preventative regime with the aim to eliminate systemic sexual harassment and discrimination.

- ***Clients pursue weaker cases in other jurisdictions***

The current costs model pushes clients into pursuing cases under less beneficial legislation in other jurisdictions. For example, the *Disability Discrimination Act 1992* (Cth) has provisions which enable clients to argue disability discrimination based on a failure of respondents to make reasonable adjustments.[53] There are no comparative provisions under the *Anti-Discrimination Act 1977* (NSW). Under this state Act, clients are required to make reasonable adjustment types of arguments on more narrow indirect discrimination provisions. At KLC, many of our clients have had to consider litigating under the less beneficial state legislation for their disability discrimination matters due to fears of an adverse cost order if they unsuccessfully litigate under the federal legislation. This is also an issue in the context of LGBTQIA+ rights, with the *Anti-Discrimination Act 1977* (NSW) having less protections than the *Sex Discrimination Act 1984* (Cth). For example, NSW remains the only state in Australia that fails to protect bisexual people from discrimination and enables religious schools to discriminate against LGBTQ students.[54]
Applicants in discrimination matters should not be forced to litigate under less beneficial legislation for fear of an adverse costs order if they lose their case. We do not think applicants should be making choice of jurisdiction decisions primarily based on costs risk in important human rights matters.

Case Study 2

Emily* started working as a casual employee in a media company in NSW. She told her employer she had epilepsy when she was hired and during her employment asked for reasonable adjustments for her condition. This included low-cost changes to the workplace for her to safely perform her role. These adjustments were not made. Emily had a seizure and took a short period of sick leave. While she was on leave, she was told by her manager she would not be given more shifts.

Emily sought advice from KLC about lodging a discrimination complaint. Despite the *Disability Discrimination Act 1992* (Cth) having stronger discrimination protections on the grounds of the refusal of reasonable adjustments than the *Anti-Discrimination Act 1977* (NSW), Emily chose not to make a AHRC complaint. Emily wanted to keep the option open of taking her matter further if it did not resolve at conciliation and she did not want to run the risk of getting an adverse costs order if she lost her case in court.

**Client's name changed to protect confidentiality*

[53] *Disability Discrimination Act 1992* (Cth) ss 5(2), 6(2).
[54] Alastaire Lawrie, 'Sydney May be Hosting World Pride, but the NSW Anti-Discrimination Act is Source of Shame'(*The Guardian*, 18 November 2022).

It is also undesirable that applicants are deterred from bringing federal discrimination cases as federal discrimination law becomes even more robust. For example, in recent years the *Sex Discrimination Act 1984* (Cth) has been significantly reformed, including through the introduction of new stand-alone causes of action for sex-based discrimination and hostile workplace environments based on sex.[55] It is vital that all applicants can use these new provisions in court and are not prevented from accessing these causes of action for fear of an adverse cost order. We believe this is a vital part of ensuring that the *Respect@Work* Report is implemented in practice.

Recommendations

Recommendation 1: An Equal Access Costs Model

The Paper sets out an 'Equal Access' costs model to costs in discrimination matters. This model operates on the basis that each party bears their own costs. An applicant who is successful can recover their costs from the respondent(s).[56]

KLC, as part of the Power to Prevent coalition, has joined with a broad range of legal academics, legal centres, legal assistance providers and unions to call for an equal access model for discrimination law. We believe now is the time for this significant access to justice barrier to be addressed so we can ensure the full implementation of the *Respect@Work* Report. We have not made this call lightly, but we believe the Equal Access model we have proposed is the only one that effectively addresses the significant access to justice barriers for our clients and encourages a more robust approach to discrimination laws in Australia. Specifically, we consider the approach preferrable for the below reasons.

Under an Equal Access model, the significant costs risk to the individual applicant is removed, with an applicant only able to be ordered to pay the legal fees of respondents in exceptional circumstances, such as vexatious claims.[57] The scope of these exceptional circumstances is something that needs to be considered and limited with a view to the important public interest nature of this type of litigation.

There are certain key features of an Equal Access model which KLC supports;

- a successful applicant will have their legal costs met by the respondent;
- if an applicant is unsuccessful, each party would bear their own costs;
- very limited exceptions allowing a court to order an unsuccessful applicant to pay the respondent's costs;
- a provision which allows an applicant when successful in part of proceedings to have all their legal fees recoverable, recognising the intersectional nature of claims.

- ***Removes costs risk as a disincentive for enforcing rights***

This model better protects our clients against the risk of a cost order if they choose to litigate their discrimination matter in the Federal Courts. People who experience the highest rates of discrimination and sexual harassment must be supported to litigate these matters without the risk of becoming bankrupt or having a huge debt simply for enforcing their rights. As set out above, the current cost model and other cost models proposed do not provide sufficient certainty on costs for many of our clients. Given the public interest nature of these proceedings, applicants should only be liable for costs orders in clearly defined exceptional circumstances. This model better recognises that discrimination law places a heavy burden on individuals to litigate their rights, and that the enforcement of rights has an overall public benefit. Australia also cannot be said to

[55] Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth); Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth).
[56] Australian Government (n 6) 28.
[57] Ibid 28.

be meeting its obligations under international discrimination conventions to protect against discrimination if it is not removing this key barrier for applicant's enforcing their rights.[58]

- ***Better preserves access to justice***

This model is the only model that both better protects our clients against the risk of an adverse costs order and enables them to recover legal fees when they win**.** A key consideration in thinking about how people can enforce their rights is to ensure that costs reform does not reduce access to justice or access to legal assistance. A potential issue identified with a hard costs neutrality approach (discussed below) is that it could reduce the range of legal options in this space and make it harder to bring claims. It is desirable given the prevalence of this issue across the Australian population that we do not reduce legal representation options in this space through these reforms. A robust system should provide a range of free legal services targeted at disadvantaged people as well as private practitioners for people who can afford to pay or enter a deferred fee arrangement.

A hard neutrality approach does not deal with the potentially significant costs to applicants if they win their matter. It also does not deal with the fact that an applicant's costs can outweigh any damages award, making the action risky. In the federal jurisdiction in particular, the technical nature of proceedings means that applicants often incur solicitor and barrister costs in their matters and that a hard costs neutrality approach is not appropriate.

- ***Development of case law that better reflects community standards***

Another positive impact of encouraging applicants to litigate matters under federal discrimination laws is how this sends a clear societal message that discrimination is unacceptable, and applicants will be supported in raising matters. As more cases are litigated under these laws, we are also hopeful that damages will increase to better reflect community standards on discrimination. Unless more cases are litigated, especially cases which highlight the impact of discrimination on lower socio-economic applicants, we are unlikely to see reductions in incidences of sexual harassment and discrimination. It is in the public interest for some discrimination cases to be litigated that highlight the unique and varied impacts of discrimination and to reinforce the operation of the law.

- ***Does not disadvantage respondents***

Under an Equal Access model, respondents are required to bear their own legal costs and in the event the matter runs to hearing and they lose, they are required to pay the applicants costs (except in limited circumstances). A benefit of this approach is that it could make respondents make more calibrated decisions around legal resourcing of cases and make genuine attempts to settle matters with good prospects. Respondents are required to bear their own costs under this model and would need to put in measures around this cost. Equal Access then adopts a costs follows the event model in terms of the respondent's liability. We think the overall public benefit to Equal Access outweighs any impact on respondents.

We also note that the number of individual respondents in matters is low. From our experience, most discrimination matters are litigated against companies and organisations. These kinds of respondents often have insurance available to them. If a company cannot financially afford insurance, applicants often do not pursue court cases against them.

- ***Availability of new protections to better eliminate and prevent gender-based discrimination***

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[58] Beth Gaze and Belinda Smith (n 11) 289.

In recent years there have been significant amendments to the SDA, including the introduction of new forms of sex discrimination (sex-based harassment and hostile workplace environment based on sex) and a positive duty on employers to take measures to eliminate sex discrimination.[59] Now more than ever, federal discrimination laws must be revised to encourage litigation under these new provisions. If applicants and particularly lower socio-economic applicants are deterred from litigating these kinds of matters, these laws may have limited impact. Respondents will not be incentivised to follows these laws if there is limited risk that applicants will seek to rely on them to enforce their rights.

- ***Allows for limited exceptions for respondents to recover***

KLC favours an Equal Access approach that allows respondents to make an application for a costs order only in circumstances where the "the court is satisfised that the applicant instituted the proceedings vexatiously or without reasonable cause."
This would allow respondents in some matters determined to be vexatious or without reasonable cause to recover their costs. This would ensure a correct balance in providing disincentives for vexatious or doomed actions, as well as recognising the important public interest nature of this litigation and the general imbalance in resources.
While the discussion paper outlines options under the *Public Interest Disclosure Act 2013* (Cth) (Section 18) *and The Corporations Act 2001* (Cth) (section 1317AH), we favour this narrower approach for respondent applications. This is because of the important public interest nature of human rights applications.
In terms of what is meant by 'successful', we also recommend that the legislation makes it clear that this means the applicant succeeds in all or part of their claim**.** We think this approach is justified given the overlapping nature of many discrimination claims. Where cases are brought without reasonable cause, respondents can rely on this to ask for their costs to be paid. Further, applicants should not be deemed to have acted unreasonably in bringing litigation just because part of their claim has failed. As above, what amounts to acting unreasonably must be narrowly construed. This is particularly important if a model is adopted which enables respondents to claim costs against *applicants if their unreasonable acts or omissions cause them to incur costs*.

- ***Settlement offers cannot be considered***

While we support narrower approach, If the approach of the *Public Interest Disclosure Act 2013* is followed we need to ensure that the rejection of settlement offers would not be considered an unreasonable act that could lead to a costs order.
We would also recommend that the legislation provides greater clarity on what may amount to an "unreasonable act or omission" from applicants that could justify a costs order against them more generally. The proliferation of Calderbank/ settlement offers in discrimination law matters is problematic and needs to be addressed in any Equal Access provision. This is a particular issue in discrimination litigation where damages are low, and this is exacerbated if the applicant is a low to medium income earner (typically people who experience the highest rates of sexual harassment and discrimination). The problem of Calderbank offers outstripping damages awards was demonstrated in the first instance decision *Richardson v Oracle Corporation Australia Pty Limited*[60] where the applicant (a high-income earner) was ordered to pay the respondent's costs as her damages were less than the Calderbank offer. This has a chilling effect on people enforcing their rights and is not appropriate when it is common that the parties are not evenly matched resourcing wise. It also does not recognise the public interest value (beyond compensation) for matters proceeding to determination and for outcomes like declaratory relief.

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[59] *Sex Discrimination Act 1984* (Cth) s47C.

[60] *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 (20 February 2013).

If an Equal Access approach like section 18 of the *Public Interest Disclosure Act 2013* is followed, we need to ensure that:

- offers of settlement that the applicant refused does not entitle the respondent to costs;
- there is a definition of 'success' that includes the applicant succeeding in all *or* part of proceedings with all their legal costs recoverable;
- that in considering whether an applicant has engaged in unreasonable acts or omissions leading to the respondent incurring costs, there is consideration of facts such as the financial circumstances of the applicant, the public interest nature of the litigation and access to legal advice for the applicant.

Recommendation 2: Objects Clause on Public Interest Nature of Discrimination Laws
To effectively implement the Equal Access model, we recommend the inclusion of an objects clause that sets out the public interest nature of discrimination proceedings in the *Australian Human Rights Act 1986* (Cth), or other legislation that creates the Equal Access model**.** This could look like a clause in a broader objects clause that explains that discrimination proceedings are public interest proceedings, and that judicial decisions around them should reflect this. This would be particularly relevant for any decisions on costs, prompting judicial officers to have regard to this when deciding what is appropriate in any given case.

Recommendation 3: Statutory Review Period for Amending Legislation
We also recommend that a statutory review period is included in any reform that creates an Equal Access model. This is vital to ensure that the amendments increase access to justice in practice and best serve to prevent and better respond to discrimination. This review period should commence 18 months after the Bill commences, with a report of the review to be tabled to Parliament and published within 6 months from the commencement of the review.

Recommendation 4: Increased Legal Funding for Legal Aid Assistance Sector
Lastly, we recommend substantial and sustained funding to the legal assistance sector, including to Legal Aid and Community Legal Centres to enable them to advise and represent clients in discrimination matters. Unless clients can access legal advice and representation, any Equal Access model will not be comprehensively and equally used in practice. The federal government must adequately support the legal assistance sector to ensure that these new costs provision assist the most vulnerable clients on the ground.

<u>Why we don't prefer other costs approaches</u>

"Soft Costs Neutrality" approach
A 'cost-neutrality' model was proposed in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*.[61] This Bill proposed a provision with a default position that parties bear their own legal costs in federal discrimination matters.[62] However, the model enables the Court to still make costs orders if it considers them to be 'just' in the case, considering a broad range of circumstances, including:

- the financial circumstances of each of the parties to the proceedings;
- the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission);
- whether any party to the proceedings has been wholly unsuccessful in the proceedings;

[61] Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) sch 5.
[62] Ibid.

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- 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; and
- any other matters that the court considers relevant.

Key issues for our clients:

- ***No certainty with broad discretion***

Under this cost-neutrality model, the starting point is that each party bears their own legal costs.[63] This seeks to provide greater certainty on costs for all parties. However, the model significantly undoes this certainty by providing a broad discretion to the Courts on awarding costs**.** We are concerned that this significant discretion will continue to provide no certainty for our clients and deter them in litigating in this jurisdiction.

For example, we are concerned that our clients may have costs ordered against them if they lose their case (under the "wholly unsuccessful" factor), or due to a wide range of other factors under the "any other matters" that are relevant factor. We are also concerned that the factor of the "conduct of the parties" in litigation will also be used against our clients and will consider the refusal of Calderbank offers. As discussed above, Calderbank offers can be used detrimentally for our clients when they receive these before getting legal advice on their nature and impact. We are also concerned with how these offers can be used given the limited case law in discrimination matters and the difficulty of advising clients on the amounts they may be able to recover in court. In practice, this model will <u>not be a cost neutral approach</u> for many of our clients.[64] Many of our clients will continue to face a risk of having costs ordered against them if they lose their case, which will deter them from litigating matters in the federal jurisdiction. It is also worth noting that apart from the factor of whether the matter 'involves an issue of public importance', all the factors to consider in the considerations provision are negative factors. This may result in courts having stronger regard in practice to why costs should be ordered in a case than to what factors show why costs should not be ordered. As above, we also know that in some cases successful applicants are still subject to a costs order. With this approach to costs generally in the court, we do not think "soft costs neutrality" is a robust enough approach, noting what a powerful brake the fear of costs is on people who experience discrimination.

- ***Model is broader than state and territory costs neutrality approaches***

We also note that the current cost-neutrality model is even broader than many other cost-neutral approaches in state and territory jurisdictions**.** For example, in NSW, section 60 of the *Civil and Administrative Tribunal Act 201*3 provides the NSW Civil and Administrative Tribunal with an even more limited basis to make costs orders, only taking into account factors such as the nature and complexity of proceedings; whether a party has been responsible for unreasonably prolonging or delaying proceedings; whether a party conducted proceedings in a way that unnecessarily disadvantaged another party; and whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance.[65] For many of our clients, the cost neutrality with

[63] Australian Government (n 6) 25.

[64] Kingsford Legal Centre, Open Letter to Parliament, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (28 October 2022) 3.

[65] *Civil and Administrative Tribunal Act 2013* (NSW) s 60.

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discretion model will not assist them, as it creates little certainty and incentive to litigate federal discrimination matters.

- ***Applicants can't recover costs if they win***

As discussed above, another key issue with this model will be that it will be difficult for applicants to recover their legal costs if they win. Applicants who win their cases will need to argue the discretionary factors under the model in order to get costs orders against respondents. This will pose an issue for our clients in making it harder for them to cover legal fees of barristers, disbursements, and other litigation costs when they win.

"Applicant Choice" Model

An alternative model proposed in the Paper is an 'Applicant choice model'. Under this model, applicants at the outset of court proceedings could elect one of two options for costs:

1) a 'costs follow the event' model; or
2) a hard cost neutrality model (where each party bears their own costs, unless a party acts vexatiously or unreasonably in litigation).[66]

This model was suggested in the AHRC's Free and Equal Position Paper,[67] and was recommended by the 1997 Report of the Senate Legal and Constitutional Affairs Committee on the Human Rights Legislation Amendment Bill 1996.[68]

Key issues for our clients:

- ***Further inconsistency in Australia's federal discrimination law***

Australia's federal discrimination laws are already highly fragmented and inconsistent. We are concerned that this approach will only further fragment these laws and create a two-tiered system of justice for many applicants. In practice, this model may mean that more financially resourced applicants are able to choose a 'costs follow the event' model and recover their legal fees, and less financially resourced applicants will not be able to do this. This could be a key access to justice issue for the clients we represent, who are unable to access the costs follow the event model for the reasons above, and so are forced to choose a model that limits their ability to recover their legal fees. This is hugely undesirable in a human rights jurisdiction and creates will in effect create two systems. We need to be addressing systemic inequality in relation to access to justice rather than entrenching it.

- ***Not true applicant's choice: 'lawyers' choice'***

We are also concerned that this model could result in clients facing pressure from lawyers to choose the costs follow the event model in order to enable their lawyers to recover legal fees. This may place a burden on applicants to face the higher costs risk to access legal representation. In this way, the model may result in not an 'applicant choice' model, but a 'lawyers choice model.' The model could also create difficulty in practice if a client chooses one model and then changes lawyers further down the line. For example, if a client has chosen a hard cost neutrality approach with one set of lawyers, this could be a barrier to another set of lawyers taking on the case if they only want to represent a client on the condition that they can recover all their legal costs from a costs order (as opposed to the client's savings/other resources).

We are also concerned that once again we place huge burdens on individual applicants to navigate a highly complex system while they must file proceedings within the correct time frame and successfully frame their action. Commencing litigation in the federal

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[66] Australian Government (n 6) 29.

[67] *Free and Equal Paper* (n 3) 195.

[68] Senate Legal and Constitutional Legislation Committee, The Parliament of the Commonwealth of Australia, Human Rights Legislation Amendment Bill 1996 (Parliamentary Paper No 8067, 26 June 1997) para 4.42.

jurisdiction is complex and stressful, having to navigate a decision around costs and trying to seek expert advice to make this decision is likely to be overwhelming. It is likely that many applicants may make this choice without legal advice and may face difficulties later based on their choice.
We have an opportunity to build a better system – we can't just say "free choice" and watch as the system continues to replicate inequality of outcomes. This is at the heart of reducing the endemic nature of sexual harassment and discrimination.

"Hard Costs Neutrality"
Section 570 of the *Fair Work Act 2009* (Cth) provides that parties can only be ordered to pay costs for proceedings brought under the Act in exceptional circumstances. Specifically, the act provides that a party may be ordered to pay costs only if:

- the Court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
- the Court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
- the Court is satisfied of both of the following: the party unreasonably refused to participate in a matter before the Fair Work Commission; and the matter arose from the same facts as the proceedings.[69]

In contrast to the cost neutrality with discretion approach (or soft cost neutrality model) that provides a non-exhaustive list of factors a Court may consider; this approach provides a more limited and exhaustive list of matters a court can consider when makes a costs order. This model is beneficial for our clients as such for providing a greater level of certainty on when costs will be ordered.

Case Study 3

Amy* started working as an administrative assistant in a small business in Sydney. Amy was subjected to ongoing sexual harassment by a colleague, including comments of a sexual nature about her appearance and personal life. Amy was also subjected to similar behaviour by several clients, and repetitively whistled at when she worked for them. Amy made a formal complaint to her employer about these behaviours. Amy was then asked to attend a meeting about her complaint, in which she was told that she was going to be performance managed. Shortly after this, she was dismissed. This experience significantly negatively impacted on Amy's mental health, which resulted in her struggling to find new employment.

Amy sought assistance from KLC about taking legal action against her employer. Amy considered her various complaint options, but ultimately, she chose to bring her complaint under the *Fair Work Act 2009* (Cth). A major benefit of this jurisdiction for Amy was that if she decided to pursue her proceeding in the Federal Courts, she would have greater protection against an adverse cost risk than under federal discrimination laws.

**Client's name changed to protect confidentiality*

However, while this model provides more protection for our clients against the risk of an adverse costs order, key issues with the model are its broad test for applicant's acting unreasonably in litigation, and the way the model prevents applicants from recovering their legal fees. As we have outlined, we believe equal access is a better approach in amalgamating the protections of a hard neutrality approach with the benefit of costs for applicants.
Key issues for our clients:

[69] *Fair Work Act 2009* (Cth) s 570(2).

- ***Broad test for acting 'unreasonably'***

A key issue with the section 570 of the FWA model is the breadth of what can be counted as acting "unreasonably" in litigation. Case law has clarified that the section is to be used in exceptional circumstances. For example, in *CFMEU v Clarke*, the Full Court said that while courts should use the discretion to ensure that parties to litigation do not engage in unreasonable acts and omissions which put the other party to undue expense, "they should be careful not to exercise the discretion with too much haste, given that such haste may discourage parties, for gear of an adverse costs order, from pursuing litigation."[70]
However, whether a party is considered to act "unreasonably" in litigation will depend on the circumstances of each case.[71] In recent years, factors such as refusing a Calderbank offer have been considered for justifying an award of costs on the basis that a party acted unreasonably in litigation. For example, in a recent case, rejecting a reasonable offer made by the respondent employer resulted in a $35,000 costs order against the applicant.[72] Similarly, in *Melbourne Stadiums Ltd v Saunter,* the Court held that the failure to accept an offer of compromise resulted in an "unreasonable act or omission causing the other party to incur costs," thus engaging the exception in s570(2)(b).[73]
Like the above, we are concerned that this provision for acting unreasonably in litigation may be used against applicants in a range of cases to obtain costs orders. We are particularly concerned that this will be done based on refusing offers to settle when applicants are not aware of the nature and meaning of Calderbank offers. Calderbanks in discrimination law most often reflect the resourcing of the parties (which is often disparate) and can be used for purely tactical purposes. We believe they are not appropriate in the discrimination sphere where there are insufficient matters going to hearing and it is very difficult to advise on merits and potential damages.
Australia's discrimination laws should be designed beneficially for applicants and to assist them with bringing cases. Applicants should not face costs orders for not understanding settlement offers. It should also be considered desirable that applicants proceed to Court to seek declarations and that discrimination is not wholly about financial outcomes. We are particularly concerned about socio-economically disadvantaged clients rejecting Calderbank offers/offers to compromise without understanding the nature and impact of these offers, and then this being used against them later to obtain costs orders.
Further, we are concerned that other conduct of applicants may be considered 'unreasonable' in litigation when it reflects limited understanding of litigation. For example, unrepresented applicants may be at risk of being seen to act unreasonably if they seek multiple and long adjournments in cases, when they do not understand the significance of these delays on respondents.
This is why we have recommended in an equal access model that if there are considerations in relation to "unreasonable conduct or omissions" this needs to be considered in the context of other facts such as whether the client was legally represented.

- ***Applicants can't recover costs if they win***

Another key disadvantage of this approach is that applicants are unable to recover their legal costs if they win**.** While this model could better protect applicants against a cost order than the current costs model and a cost neutrality with discretion model, it could make it harder for applicants to secure legal representation. Many legal practitioners and

[70] *Construction, Forestry, Mining and Energy Union v Clarke* [2008] FCAFC 143 [29].
[71] Ibid [28].
[72] Adamczak v Alsco Pty Ltd (No 4) [2019] FCCA 7.
[73] *Melbourne Stadiums Ltd v Saunter* (2015) 229 FCR 221, 144.

barristers operate on a no-win no-fee basis and may be deterred from assisting applicants in discrimination matters if they cannot get their legal costs covered.
The approach may also in practice result in applicants who can afford to litigate matters paying their own legal costs out of the sum of damages they are awarded. This is particularly concerning given the limited amount of compensation in discrimination matters that are awarded. For example, from 1986 – 2021, the average award for general damages in federal sexual harassment matters was only $14,268.89, and the average amount for economic loss was $30,034.09.[74]
Furthermore, the federal jurisdiction is technical, formal and difficult to navigate. It almost always requires Counsel and expert reports to properly prepare a case. These are costs that add up and which should be recoverable if an applicant succeeds.

Conclusion

We welcome the consultation on this important recommendation from *Respect@Work*. The costs regime that underpins Australia's federal discrimination laws is currently not fit for purpose in ensuring access to justice for many people who experience discrimination. As outlined in this submission, we recommend that Parliament legislate an equal access model on costs in federal discrimination matters. We have recommended the above model, which slightly varies the proposal in the Paper, considering how to address the significant structural barriers for applicants and the importance of human rights.
We submit that the equal access model proposed will benefit people who experience discrimination and Australian society more broadly in discrimination matters in several critical ways. These include by removing the major barrier to litigation for applicants of a significant cost risk in discrimination matters, enabling applicants to better access legal representation, providing the opportunity for more case law in discrimination matters and enabling applicants to access new and improved protections under Australia's discrimination law, including under the SDA. This issue on costs needs urgent resolution. *Respect@Work Report* will not be implemented until it is effectively resolved.
We look forward to further consultation with the government on this model as required.
Please let us know if you have any questions about this submission. You can reach us at legal@unsw.edu.au.
Yours faithfully,
KINGSFORD LEGAL CENTRE

Emma Golledge - Director

Madeleine Causbrook -Solicitor/Clinical Supervisor Kingsford Legal Centre

Endorsing organisations: Australian Centre for Disability Law, Caxton Legal Centre Inc, Circle Green Community Legal, Community Legal Centres Australia, Community Legal Centres NSW, Employment Rights Legal Service (NSW), HIV/Aids Legal Centre, Inner City Legal Centre, Job Watch Inc , Mackay Regional Community Legal Centre Inc, Top End Women's Legal Service Inc, Redfern Legal Centre , Women's Legal Services Australia, Women's Legal Service NSW, Working Women's Centre SA, Western NSW Community Legal Centre Inc.

[74] Thornton, Pender and Castles (n 4) 39.

List of Endorsements

Redfern Legal Centre

Employment Rights Legal Service

Women's Legal Service NSW

Inner City Legal Centre

HIV/AIDS Legal Centre

Women's Legal Services Australia

Community Legal Centres Australia

Community Legal Centres NSW

Caxton Legal Centre Inc

Working Women's Centre SA

Western NSW Community Legal Centre Inc

Mackay Regional Community Legal Centre Inc

Basic Rights Queensland Inc as Working Women Queensland

Job Watch Inc

Circle Green Community Legal

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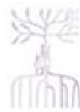

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