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# Official Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION  
COMMITTEE

**Australian Human Rights Commission Amendment (Costs Protection) Bill 2023**

Public

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BY AUTHORITY OF THE SENATE

## LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

**Wednesday, 31 January 2024**

**Members in attendance:** Senators Antic [by audio link], Green, Polley [by video link], Scarr and Waters [by video link]

**Terms of Reference for the Inquiry:**

To inquire and report into:

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

WITNESSES

**BANKS, Dr Robin, Member, Australian Discrimination Law Experts Group [by video link].....13**

**BIDDLESTONE, Ms Katie, Director, Industrial, Safety and Equity Policy, Shop, .....2**  
**Distributive and Allied Employees Association [by video link] .....**

**BLACKHAM, Associate Professor Alysia, Member, .....13**  
**Australian Discrimination Law Experts Group [by video link].....**

**CAMPBELL, Ms Leonie, General Manager, Policy, Law Council of Australia .....13**

**CODY, Dr Anna, Sex Discrimination Commissioner, Australian Human Rights Commission .....35**

**CROUCHER, Emeritus Professor Rosalind, President, Australian Human Rights Commission..35**

**DE ABREU, Ms Melissa, Senior Lawyer, Australian Human Rights Commission .....35**

**EASTMAN, Ms Katherine, AM, SC, Chair, Equal Opportunity Committee, .....13**  
**Law Council of Australia.....**

**FEEHAN, Ms Caitlin, Lawyer, Working Women's Centre SA .....19**

**GARTMANN, Ms Petra, Assistant Secretary, Human Rights Branch, .....35**  
**Attorney-General's Department .....**

**GOLLEDGE, Ms Emma, Director, Kingsford Legal Centre, UNSW.....19**

**IRA, Ms Lisa, Senior Policy Officer, People with Disability Australia [by video link].....31**

**KASSISIEH, Mr Ghassan, Legal Director, Equality Australia [by video link].....19**

**KENDALL, Ms Abbey, Director and Principal Solicitor, Working Women's Centre SA .....19**

**LAW, Ms Courtney, Senior Solicitor, Strategic Litigation, Grata Fund [by video link] .....31**

**MARCUS, Mr Shaun, National President, Australian Lawyers Alliance.....13**

**McINTYRE, Mr Greg, SC, President, Law Council of Australia.....13**

**McKERNAN, Ms Katherine, Executive Director, National Legal Aid.....43**

**MORRISH, Mr Jack, Senior Policy Adviser, Workplace Relations, .....8**  
**Australian Chamber of Commerce and Industry .....**

**PELDOVA-McCLELLAND, Ms Alessandra (Sascha), Senior Legal and Industrial Officer,.....2**  
**Australian Council of Trade Unions [by video link] .....**

**REINECKE, Ms Isabelle, Executive Director, Grata Fund [by video link].....31**

**SCHLEIGER, Ms Melanie, Special Adviser, Strategic Litigation, Equality Law Program, .....43**  
**Victoria Legal Aid .....**

**SHEEHAN, Ms Anne, First Assistant Secretary, .....35**  
**International Law and Human Rights Division, Attorney-General's Department .....**

**SKIPSEY, Mr Mitchell, Senior Solicitor, Public Interest Advocacy Centre [by video link] .....31**

**SOUTHON, Mr Michael, Executive Director, Freedom for Faith.....25**

**SPENCER, Mr Mark, Member, Board of Reference, Freedom for Faith .....25**

**STEAD, Bishop Michael, Chair, Freedom for Faith [by video link] .....25**

**STEENHOF, Mr John, Managing Director, Human Rights Law Alliance.....25**

**STEPHENS, Ms Claire, Acting Director, Sex and Gender Section, .....35**  
**Attorney-General's Department .....**

**SWANNIE, Dr Bill, Member, Australian Discrimination Law Experts Group [by video link].....13**

**TILBURY, Ms Ellen, Principal Solicitor, Public Interest Advocacy Centre [by video link].....31**

**TINSLEY, Ms Jessica, Director, Workplace Relations, General Counsel, .....8**  
**Australian Chamber of Commerce and Industry .....**

**YATES, Ms Joanne, Senior Policy Manager, New South Wales, .....31**  
**People with Disability Australia [by video link] .....**



**BIDDLESTONE, Ms Katie, Director, Industrial, Safety and Equity Policy, Shop, Distributive and Allied Employees Association [by video link]**

**PELDOVA-McCLELLAND, Ms Alessandra (Sascha), Senior Legal and Industrial Officer, Australian Council of Trade Unions [by video link]**

**Committee met at 12:58**

**CHAIR (Senator Green):** Good afternoon, everyone. I declare open this public hearing of the Legal and Constitutional Affairs Legislation Committee inquiry into the provisions of the Australian Human Rights Commission Amendment (Costs Protection) Bill.

I acknowledge the traditional custodians of the land on which we meet today and pay my respects to their elders past and present. I would also like to acknowledge and welcome other Aboriginal and Torres Strait Islander people who are participating in today's public hearing.

The committee's proceedings today will follow the program as circulated. These are public proceedings being broadcast live in Parliament House and via the web.

I remind witnesses that in giving evidence to the committee they're protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee prefers evidence to be given in public, but under the Senate's resolution witnesses have the right to request to be heard in confidence, described as being in camera. If you are a witness today and intend to request to give evidence in camera, please bring this to the attention of the secretariat as soon as possible. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may also, of course, be made at any other time.

I welcome our first witnesses for this afternoon, the SDA and ACTU. Thank you for joining us and participating in today's committee. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. Would either of you like to make a brief opening statement before we go to questions?

**Ms Peldova-McClelland:** Yes, we would. Good afternoon, Chair and senators. I acknowledge that I am speaking to you from the land of the Wurundjeri people of the Kulin nation. Thank you very much for the opportunity to make a submission and appear before the committee today.

The bill before the committee is the result of a thorough and considered consultation process undertaken by the government over the last 12 months. During that process, the equal access model emerged as the model that would best achieve the policy objectives of recommendation 25 of the *Respect@Work* report. It was widely seen as being superior to other options. The Power to Prevent Coalition, a diverse group of organisations, advocated for this reform, with 85 organisations endorsing a call for an equal-access cost model in discrimination and sexual harassment matters, representing broad support across the sector.

The ACTU welcomes and supports the bill, which implements a modified equal-access cost model. It will mean that individuals who bring claims of sexual discrimination and sexual harassment can recoup their legal costs if they're successful, whilst also being protected from having to pay legal costs if they are unsuccessful, except in limited circumstances. Despite nearly three million Australians experiencing sexual harassment each year, only 11 cases are brought to court each year on average. This is a shockingly low figure. This is because the barriers to bringing claims are enormous, and many women make the very rational decision to not risk their financial future by pursuing a case in the courts.

This bill, in our view, is a breakthrough development for victim-survivor rights to legal justice. By removing significant financial barriers that prevent victims-survivors from bringing claims, it will greatly enhance access to justice. It will ensure applicants can access legal representation and that they can come forward without the risk of becoming bankrupt or facing significant debt simply for enforcing their rights. It will lead to more judicial consideration of antidiscrimination laws, send a clear message that such conduct is unacceptable, allow damages awards to better reflect community standards, and contribute to systemic cultural change. It levels the playing field by addressing the power imbalances and resource disparities that are typical of discrimination proceedings.

The ACTU makes four recommendations regarding a few technical matters which we believe will strengthen the bill further and ensure its aims are not undermined in practice. Those recommendations are outlined in our submission, and I won't go into them here. We urge the committee to recommend the bill's passage.

We note that there have been some concerns raised by others about this bill, including that it will clog up courts with unmeritorious claims. There are already sufficient protections in place to deter unmeritorious complaints—a fact recognised by the Australian Human Rights Commission. There are also protections built into the equal access model itself. Respondents can recover costs where proceedings are instituted vexatiously, or without reasonable cause, or where the applicant has engaged in unreasonable conduct. We've seen the equal access model applied to whistleblowers and there's no evidence that this has led to a significant increase in unmeritorious claims. Given that less than three per cent of finalised complaints proceed to court, the risk of an increase in unmeritorious claims in real numbers is very low. The real problem is that the high costs and risks of litigation stop many meritorious claims from proceeding. This bill aims to take just one of those risks away.

Another concern, raised by others, is that that bill might reduce the incentive to engage in alternative dispute resolution. On the contrary, applicants still have an overwhelming incentive to settle matters, including the significant time, cost and emotional energy demanded by litigation, which is often retraumatising and takes a huge toll on an applicant's wellbeing, reputation, career and relationships. Far from removing incentives for parties to settle, the bill creates incentives for respondents to constructively engage in alternative dispute resolution, rather than applicants being forced to settle claims for woefully low sums of compensation because respondents know they're unlikely to pursue their claim in the courts. Rather than the inaccurate claims that this bill tilts the balance towards applicants, it helps to level the playing field by addressing the deep structural inequalities that exist in our society and which are all too often replicated by our legal system. The equal access model is the only model that ensures the damages awarded to successful applicants are not eaten into by their costs, and it's the only model that doesn't entrench and exacerbate power imbalances and barriers to justice. It solves the problems inherent in other cost models.

The individualisation of Australia's antidiscrimination regime means that applicants are acting in the public interest when they bring a claim if they are seeking to vindicate legal rights that ultimately contribute to wider social change. Our system still relies heavily on individuals who have experienced this conduct bearing the burden of bringing complaints forward. They should have an equivalent cost protection to whistleblowers if they act to rectify both an individual and a social wrong. This reform is crucial to ensuring that respect at work is effectively implemented in practice and is a necessary step to address and prevent discrimination and harassment in the future. Thank you and I'm happy to take questions.

**CHAIR:** Thank you very much. Ms Biddlestone?

**Ms Biddlestone:** Thank you.

**CHAIR:** Thanks for providing a copy of your opening statement. We have it in front of us, but if you could take us through it that would be great.

**Ms Biddlestone:** Good afternoon, Chair and senators. I acknowledge that I am speaking to you from the land of the Wurundjeri people of the Kulin nation. Thank you for the opportunity to make a submission and to appear before the committee today.

SDA members work predominantly in retail, warehousing and fast food. They are more likely to be women and young workers, they are at a greater risk of experiencing sexual harassment than workers in most industries and their experience of discrimination in a workplace is far too common.

The SDA has been very active in advocating for change to better protect workers from harassment and discrimination and better support them to access justice and a remedy when it happens. We have made submissions in relation to Respect@Work and also to numerous reviews and inquiries into workplace discrimination. We commend the government on the implementation of the recommendations of the Respect@Work report, and the SDA welcomes and supports the bill to implement a modified equal-access cost model. We support the submissions of the ACTU and the opening statement given by Ms Peldova-McClelland.

The implementation of a modified equal-access cost model will remove one of the barriers facing workers who, through no fault of their own, have been subject to discrimination or harassment, and it will provide a fairer, more balanced playing field when it comes to access to the justice system. A worker who has been subject to discrimination and harassment which has led to them experiencing harm to their health and wellbeing for their job, career progression or income should not then have to choose whether to proceed with a complaint because of fear of costs being awarded against them.

The SDA regularly represents and supports members when they have workplace issues involving discrimination or when they have been sexually harassed. All available options to resolve a complaint are exhausted before any form of litigation is considered. We engage directly with employers and participating companies' internal complaints processes, which can often take weeks into months. Only if a matter is not

resolved are external options such as antidiscrimination tribunals or the Fair Work Commission considered, and only then if the member is willing and able to pursue the complaint.

By this stage it will be months or longer before it is either settled or concluded without resolution and litigation through to courts proceeds. This is after a worker is often still suffering as a result of the discrimination or harassment and has been through an internal complaints process and a tribunal process where they have had to endure questions raised about their experience and their credibility, which can be more damaging than the discrimination and harassment itself. A worker who is then brave and resilient enough to consider making a court application should not have to make that decision with fear of financial penalty. In our experience, this is a real consideration—not one based on whether or not the discrimination or harassment occurred but because even with the very best of cases there is never a guarantee of success in a court proceeding. The threat of costs being awarded against our members is real and is a barrier to fully accessing the protection of discrimination laws.

We understand some submissions made to the committee have raised concerns about whether it will impede on the use of early alternative dispute resolution options or that it may result in a large number of applicants bringing unmeritorious and protracted litigation. As outlined in my statement so far, workers who have been harassed or discriminated against will engage in any available option to resolve their complaint, including internal and external options, before they consider going to court. The proposed changes to the costs provisions will not impact on this. It should also have a positive impact on the resolution of complaints before applications to court are made, because under the current system employers know most workers won't proceed partly due to the fear of costs being awarded against them.

The SDA recently represented a member in relation to pregnancy discrimination. We tried to settle the matter directly with the company, without success. An application was then made to the Fair Work Commission, where, again, we tried to settle the matter in a constructive way but, again, without success. The only option available was to make an application to the Federal Court. The prospect of costs being awarded in the event the case was unsuccessful was a consideration for our member. The application was made and the matter was settled just prior to the scheduled hearing, more than two years after the matter was first raised with the company—and our member was almost due to have her next child by then. While in this case our member took the decision to proceed it would have been an easier, less stressful decision if an equal-costs model was in place, and we believe it may have led the employer to settle much earlier.

Reporting to employers remains stubbornly low, applications to tribunal are low and litigation is very rare on matters relating to harassment discrimination. This change will not result in a flood of litigation. It will, however, have a material impact on the ability for a worker to access the courts to pursue a complaint they have not been able to resolve through other means without the financial fear of costs against them.

Thank you. I'm also happy to take questions.

**CHAIR:** Thank you very much.

**Senator SCARR:** Can I thank the witnesses for appearing today and for all the work that you, your organisations and members do in terms of representing workers who are in a position where their rights need to be protected. Can I also commend the ACTU in relation to the quality of its submission; I think it reflected a great deal of work and thought. It certainly helped my deliberations, if I can put that on the record.

Having said that, I would like to put to you some of the propositions put forward by the Australian Human Rights Commission. In your opening statement you referred to the fact that some parties believe that alternative dispute resolution processes may be deleteriously affected because of the proposed costs regime. But I don't think either of your organisations referred to the fact that the Australian Human Rights Commission itself, in its own submission, has raised that concern.

I want to put to you a number of propositions in the Australian Human Rights Commission submission and get your response to them. The first is in paragraph 14 of the AHRC's submission:

While the Commission understands the impetus to ensure certainty for applicants in their costs exposure, removing the court's consideration of reasonable settlement offers may have the unintended consequence of invalidating the effect of an early settlement offer and significantly impacting on alternative dispute resolution and settlement options prior to trial and the final determination of proceedings.

That's coming from the Australian Human Rights Commission—not business stakeholders or employer stakeholders but the commission itself. How do you respond to that concern raised by the commission itself?

**Ms Peldova-McClelland:** Thank you for your kind words about the ACTU's submission; it's most appreciated. We address these issues the Human Rights Commission raises in its submission in our submission; we had the benefit of seeing it before we filed our submission. We respect the Australian Human Rights

Commission as a crucial institution in this country, but we disagree with their view about the consequences of this bill. That's because applicants in particular have an overwhelming incentive to settle matters, and the reality is the vast majority of matters settle.

Some of those incentives to settle include: the inherent uncertainty of litigation—especially in antidiscrimination law, which is very technical and where you can lose on very technical points even if your claim has substantial merit; the significant time, cost, work and emotional energy demanded by litigation, which deters most sane people from pursuing a claim to court; the financial impact on applicants if they're unsuccessful, noting that unsuccessful applicants under this model still need to bear their own legal costs, and, for many, that makes litigation around a breach impossible; the impact on applicants' mental health and wellbeing; going through litigation, which, as I said in my opening statement, is often retraumatising and exacerbates harm; and the public nature of proceedings—a lot of people don't want those sorts of things on the public record because they know that, unfairly so, it will impact their reputation and future employment. They have conciliation processes that are confidential available to them, which can be a positive experience if done well because it allows applicants to speak about the impact of conduct on them. Conciliation also offers an opportunity to negotiate tailored, meaningful and creative outcomes that a court can't order such as changes an organisation may commit to to prevent future conduct and change its culture or by providing an apology or a reference. We say applicants have significant incentives to consider offers of settlement and take genuine steps to resolve a complaint.

**Senator SCARR:** Do you understand how I'm looking at it and concede that the Australian Human Rights Commission itself, which deals with these matters on a day-to-day basis—an institution that is known for its fierce independence—is raising these concerns? I'll give you another example: in paragraph 15, they raise the concern about exclusion of a court considering whether or not a complainant engages in the conciliation process itself in terms of deciding whether or not costs are awarded. In the Fair Work jurisdiction, if an applicant goes to court and hasn't even bothered to or refused to engage in conciliation processes, that can be considered in terms of making an award of costs. But, under this model, it would not be considered.

The Australian Human Rights Commission says:

In expressly removing this from the court's consideration of an appropriate award of costs, the proposed reforms may significantly reduce the incentive for parties to take genuine steps to resolve a complaint and meaningfully engage in the Commission's complaints and conciliation process ...

Shouldn't we be seeking, as members of the legislature, to promote a system where sexual harassment complaints and discrimination complaints (a) don't occur—and that's never going to happen; we're not going to have a perfect world—and (b), when they are made, are conciliated, mediated and resolved at the earliest possible stage, for all the reasons our witness from the shoppies union referred to?

**Ms Peldova-McClelland:** We also deal with these matters every day in the union movement, as do community legal centres and legal aid. Those submissions by those organisations are all expressing a similar or the same view as the ACTU. In addition to what I answered before, I would say that the current costs risks actually hampers conciliation processes by the commission now. That's because respondents often don't engage genuinely and constructively to resolve a complaint or meaningfully engage in those commission processes. Common strategies used by respondents include offering no financial compensation and conciliation or making incredibly low offers that demonstrate a profound lack of interest in taking the complaint and the process seriously. Research shows this is particularly acute for low-income and vulnerable workers, who already receive a very small amount of damages, if they are lucky, in comparison to higher income earners. We say that, rather than removing incentives for parties to settle, this bill actually creates incentives for respondents to genuinely engage in alternative dispute resolution at an early stage. Also, the current conciliation function that the AHRC has—which is still mandatory, by the way; nothing in the bill changes that—still requires parties to lodge a complaint with the commission first and go through those processes—

**Senator SCARR:** Sorry, but they can refuse—

**CHAIR:** Senator Scarr.

**Senator SCARR:** I've got limited time. I'm trying to—

**CHAIR:** I know you have limited time, but what you're not going to do is speak over the witness before she's finished. Let her answer the question, then you can ask a question.

**Ms Peldova-McClelland:** I think I know you where you were going, which is that the explanatory memorandum refers to not engaging in conciliation, but it wouldn't be an unreasonable act or omission.

**Senator SCARR:** Correct.

**Ms Peldova-McClelland:** The reason for that is because, for many applicants, the way they need to engage in those processes can be re-traumatising. It can be incredibly difficult to sit in the same room as the person who sexually harassed you or discriminated against you. I think the explanatory memorandum is responding to concerns that those processes should occur in a safe way for applicants. It's not to say that applicants are excused from engaging in these processes: far from it. They don't have an incentive to; they have an incentive to resolve these matters early so they can move on with their lives and get closure.

**Senator SCARR:** But surely, in terms of a conciliation process, those issues you legitimately raise about re-traumatisation apply equally to a court process, perhaps even more so, because it's in the public domain. Secondly—and I'll put this to the Human Rights Commission—surely there are ways in which the Human Rights Commission, even today, make sure that in a conciliation process the applicant is not forced to be in the same room as someone who's alleged to have sexually harassed them. I'm sure our friends at the Human Rights Commission are alive to that issue of re-traumatisation. Wouldn't that be the case?

**Ms Peldova-McClelland:** Absolutely, yes, they would be. I'm sure there are many ways in which they accommodate that in the conciliation processes.

**Ms Biddlestone:** Am I able to respond to the questions as well?

**CHAIR:** Yes.

**Ms Biddlestone:** With all respect to the submissions made by the Australian Human Rights Commission, I think the characterisation of how applicants approach a conciliation or their application to the Human Rights Commission, in our experience, is not accurate. When our members choose to make an application to the Australian Human Rights Commission, they are doing that in good faith and entering into that process with the view of participating in the conciliation conference in the best way that they can, with the view of getting resolution through that process. We don't talk about next steps until we have gone through that process with our member. Given that these applications made to the Human Rights Commission are led by complainants, I think it would be a very rare case that a complainant would not participate or engage in that process. So I think we're talking about a very unlikely and rare circumstance that that might occur. That is definitely not our experience.

**CHAIR:** Thank you. Senator Scarr, do you have one more follow-up? Then I'll hand to Senator Waters.

**Senator SCARR:** I've only got one more question. I may put questions on notice for you both. Ms Biddlestone, to take on your point then, if that is the case—and I accept your evidence that in the vast majority complainants and applicants will engage in the conciliation process, and I think we should do everything to support them in doing that—why should there be any concern that a court should have the discretion to consider circumstances where a complainant or applicant does not engage in the conciliation process? That deprives the respondent of a real opportunity to take action in private to resolve the matter. There's benefit to the justice system in terms of these matters being resolved as quickly as possible, and your case study is a good example of that. Aren't you arguing for the retention of the consideration of someone not engaging in a conciliation process because, in your experience, in the vast majority of cases, good-faith complainants and applicants will engage in the conciliation process?

**Ms Biddlestone:** Yes, it's absolutely the case that, in all of the times that I've been involved in taking an application to the Human Rights Commission, it's getting employers to participate in that process that's often the barrier rather than the applicant. It's more often a difficult proposition to compel an employer to engage in the conciliation process rather than the applicant or complainant. We believe that there are already sufficient protections within the bill in relation to the awarding of costs, and we don't think that there should be any extension of that. In fact, if anything, having the cost provisions amended in the way that the bill proposes, we believe, will provide incentive for respondents, employers, to participate more fully and constructively in the early resolution options that are available to applicants.

**Ms Peldova-McClelland:** You'd need to look at the circumstances for the reason that the applicant might say, 'It's not good for my health to engage in this process.' That might be because they're forced to be in the same space as the person, but it may also be, as is often the case and in my own personal experience, that they've already tried to resolve the complaint before they get to the conciliation process and they may already have had to sit across from that employer and that perpetrator and been told they're a liar and been told that they're not going to get a cent. These are things that happen in conciliation and settlement rooms every day of the week, so, if those things have already occurred, someone going through it again is not only not useful but actively harmful. I'd say you'd need to look at the circumstances.

**CHAIR:** I'm going to hand over the call. We've had some very detailed opening statements and submissions, and we have some questions from Senator Waters now. Thank you.

**Senator WATERS:** Thank you very much, Chair. Thank you both very much for being here today but also for the submission and the work that you do to support workers. I note in particular, Ms Biddlestone, that your workers are essentially the cohort that's most likely to be subjected to sexual harassment in their workplace, noting that 2022 survey that the Human Rights Commission did about sexual harassment in the workplace. I reiterate that you said that only about 14 per cent of your workers report that, and, from recollection, the majority of those harassed were between the ages of 15 and 19, so we're talking about very young people. I just want to put to you some of the notions from some of the larger industry groups and even, in my perspective, the nub of the Law Council submission that somehow people are going to be going to court just on a whim because they have nothing better to do with their time. I'd just like you to reflect on the power imbalance and the courage and the mettle that it takes for a young person to even consider making a complaint, let alone going all the way to the court—just to dispel some of those conceptions that this is just something that someone will do lightly. And can you please reflect on how you think the proposed cost model in this bill, the modified equal-access cost provision, could help potentially counter that power imbalance?

**Ms Biddlestone:** Absolutely. Unfortunately our members experience sexual harassment at much higher rates than most other industries, but in particular it's young female workers that are most exposed. The survey that we did with the Human Rights Commission back in 2018 showed that if you are a young female worker you are more likely than not to be sexually harassed in the workplace. If you're under the age of 30 it's around a 60 per cent likelihood that you will experience sexual harassment, and it's more than 50 per cent if you're a young worker under the age of 18, so there's a very high risk of sexual harassment.

The other unfortunate thing is that the level of reporting is very low. We've been doing a lot of work to try to encourage our members to report sexual harassment when it does occur, and we've been working with employers on doing that as well, but it remains very low. We're talking about making reports to an employer, let alone that young person, if they're not able to resolve it, taking the next step of going to an external jurisdiction and making a complaint. It's very difficult to get a young person to do that. But we think that improvements to the way the legislation works—the access to justice, for example, through the proposition in this bill to change the costs model—will at least allow a young person or anyone else in the workplace who is discriminated against or sexually harassed to seek justice fully through the system and not be stifled if they're unable to resolve it at the workplace level or through conciliation through an antidiscrimination tribunal or through the Fair Work Commission. We think it's really important that the options are available but, also, in terms of a preventive measure, because this isn't just about seeking justice for people who've already been discriminated against or sexually harassed; this is about looking at the whole system and making sure that it provides a preventive measure and a deterrent to sexual harassment and discrimination. We need to make sure that people who are discriminated against or sexually harassed have access to each stage of the justice system so that employers understand that and can make sure that they're doing what they can to prevent those sorts of things happening in workplaces in the first instance.

**Senator WATERS:** Thank you. I really like your point there that people aren't just accessing justice for their own private restoration; they're actually seeking to improve the system for everyone else to come. The public interest element of these cases can't be discounted, in my opinion.

Ms Peldova-McClelland, thank you very much for your comprehensive opening statement. I found myself in fierce agreement with all of it. I note that in your submission you suggested a few additional changes to the bill. I'd just like to give you the chance to briefly go through what you think they should be. In the context of other submitters saying they think the bill's too strong, I'm interested in your view on the bill actually needing to be strengthened a bit more and in what manner.

**Ms Peldova-McClelland:** We've got four recommendations. The first is that it be amended so that successful respondents might be liable for costs that are incurred by applicants as a result of the respondent's unreasonable acts or omissions. The converse already applies in the bill. If an applicant does an unreasonable act or omission they may be liable for costs to the respondent. We say that there should be an equivalent potential for applicants so that they don't have to bear the costs of unreasonable acts or omissions by respondents, as a matter of fairness. Without that sort of protection, we're concerned that successful respondents who, for example, unreasonably drag out or delay litigation, fail to comply with court orders or rules, or engage in abuses of process will substantially increase the cost of litigation but won't be liable for that cost. That's recommendation 1.

Recommendation 2 relates to the explanatory memorandum. It contains some really helpful guidance in relation to what an unreasonable act or omission is. That phrase is used in two subsections of the bill, and we would like it to be made clear in the EM that the guidance applies to both subsections and not just one subsection. That's a fairly minor change.

The third recommendation is that the bill expressly exclude the consideration of formal and informal settlement offers, including Calderbanks and offers of compromise, in relation to any discretion to award costs against an applicant. The reason that we think this is so important is that settlement offers are used every day of the week and exploited as part of a litigation strategy to put pressure on applicants to settle and to make sure respondents can recoup their costs, so even in cases where applicants are successful, because they don't beat the offer that was put in the Calderbank or the offer of comp, they're the ones who have to pay the costs, and it has little to do with the merits or circumstances of the claim. That has a chilling effect on workers proceeding with litigation even where they're seeking really important non-monetary outcomes like declarations or penalties. We also think that there's going to be an increasing issue in light of the Respect@Work guidelines on confidentiality clauses, because we think that it's both likely and desirable that increasing numbers of applicants won't want to agree to confidentiality clauses as part of a settlement, and therefore they'll be knocking back more settlement offers that potentially involve those clauses.

**CHAIR:** I am going to try to wrap you up in a minute. Sorry. We're just going a little bit over time. Senator Waters, I need to move on to our next witnesses.

**Senator WATERS:** Just the fourth recommendation? I think she's almost finished, and I don't have any further questions after that.

**CHAIR:** Sure.

**Ms Peldova-McClelland:** Thank you. Yes, the fourth recommendation is that the additional exemption in 46PSA(6)(b) should be removed. We think that it's a departure from the rationale and principles of the equal access model and that it stratifies respondents so that only certain types of applicants have protection against certain types of respondents, which reinforces the barriers to justice. Applicants shouldn't have to face financial ruin regardless of who the respondent is. However, we've said in our submission that, if the committee's of the view that there needs to be an exception of this type, we believe that its narrow construction is appropriate.

**CHAIR:** Thanks very much. Thank you, Senator Waters, for being as brief as possible. We'll just go a little bit over time into the next witnesses.

I just have one question to wrap up for this panel. I just want to pick up on something that you raised earlier: the effect this will have in workplaces. The deputy chair said—and this is not a personal reflection on you, Deputy Chair; I know you're very engaged in these issues—that we can't have a perfect world. But actually sexual harassment isn't inevitable, should be preventable and should be at zero per cent, but instead 89 per cent of Australian women have been sexually harassed in their lifetime. This cost order is a small part of the broader Respect@Work reform, but how does this part of the reform actually help to prevent sexual harassment in the first place, which is the ultimate goal, and how will it make workplaces safer now that we recognise that sexual harassment is actually a workplace health and safety issue?

**Ms Peldova-McClelland:** I think there are a few components to this. More claims are going to be brought, because they don't have that huge risk looming over them. For low-paid and vulnerable workers in particular, in industries where this is rife, it means that they might actually start to have a chance of getting some justice and getting some decisions on the public record. Getting things on the public record and having increased judicial consideration of these laws are really important because, as both the SDA and I have already referred to, the individualisation of antidiscrimination means that individuals are playing a role in enforcement. We don't have a regulator similar to what we have other areas, so the role that individuals play in bringing forward complaints is contributing to the enforcement of those laws and making sure that we can have the systemic cultural change that the *Respect@Work* report called for.

The other advantage of having more judicial consideration of the law is that the awards of damages, which are currently very low, will be tested against community standards, and I would say that they will rise. That will also contribute to broader cultural change. We'll start to recognise the real harm in these behaviours of discrimination and harassment, and that will be recognised in public decisions. All of that is going to make both workers and employers become more and more educated and more and more aware of the laws that exist and the obligations and rights that they have, and that will lead to cultural change in workplaces and make workplaces safer.

**CHAIR:** Thank you. Ms Biddlestone, do you want to add to that?

**Ms Biddlestone:** Yes, just briefly. I think this really is the last piece in the puzzle in terms of the changes that have already been made in relation to the *Respect@Work* recommendations. We are seeing employers taking on board all of the changes that have already happened, in terms of making changes to policies, procedures and training, and to try and prevent wrongdoing, especially in relation to their new positive duty.

But what we don't want to see is what happened when the legislation was introduced in 1984. There were a whole lot of policies around sexual harassment and discrimination. Over a period of time when we failed to see any litigation in these matters, we got to a situation where employers started do less and less in relation to discrimination and sexual harassment. We want to make sure that the positive improvements that we've now made in relation to legislative protections for workers, for discrimination and sexual harassment, are able to be enforced through litigation, because without that my fear is that in 10 years time we will look back and say, 'They were all great changes to legislation, but, because we have not been able to enforce it, we have not been able to get the cultural change that we needed.' I believe this is a really important change to make sure that all of the pieces are there so that we can actually get some change for workers.

**CHAIR:** I'm sorry, we have run overtime and we do need to go to our next witnesses. Thanks for taking the time to give evidence and for your really detailed submissions and opening statements. We appreciate the time it's taken to prepare those. Thank you very much.

**MORRISH, Mr Jack, Senior Policy Adviser, Workplace Relations, Australian Chamber of Commerce and Industry**

**TINSLEY, Ms Jessica, Director, Workplace Relations, General Counsel, Australian Chamber of Commerce and Industry**

[13:41]

**CHAIR:** I now welcome representatives from the Australian Chamber of Commerce and Industry. It's nice to see you again. Thank you for taking the time to speak with the committee today. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. I notice you have an opening statement that's been circulated, thank you very much. Would you like to present that opening statement before we go to questions?

**Ms Tinsley:** Very briefly, for all of us.

**Senator SCARR:** We're running behind schedule. I wonder if the witnesses might be inclined just to table their opening statement.

**CHAIR:** Do you want to give us the key highlights quickly?

**Ms Tinsley:** Sure. We obviously welcome the opportunity to appear today. ACCI has, for decades, advocated on behalf of small and family businesses in particular, which will be a key plank of our evidence today. We don't support passage of this bill. Primarily, we believe this bill will cause a significant uptick in class action by plaintiff law firms and well-resourced litigation funders by imposing an asymmetrical cost model on respondent businesses, including small businesses in particular, without providing an exclusion against representative action. Furthermore, the bill introduces an exceptionally high threshold for the circumstances under which costs would be awarded in favour of a respondent business or where a respondent business may be able to avoid paying an applicant's costs. I'll get to this threshold later in my evidence, I have no doubt.

**CHAIR:** I'm sure you'll be asked questions about it, too.

**Ms Tinsley:** Yes, absolutely. We also believe the proposed cost model will incentivise speculative proceedings by removing disincentives for bringing forward cases with little to no chance of success. By minimising the chance that any costs will be incurred by the complainant in ongoing proceedings, the bill will also discourage early settlement or alternative dispute resolution, causing a heavier case load for the judiciary and the work of the commission.

Sexual harassment is obviously a very serious issue, and businesses work constructively with consecutive governments in implementing its response to the *Respect@Work* report. However, on this occasion we believe what is being proposed does not reflect what was in the *Respect@Work* report for reasons I have no doubt we'll get questions about. So, in short, again, we oppose the legislation, noting that we're certainly not alone in this position. We're joined here by the Law Council, and also, very significantly, the Australian Human Rights Commission has expressed concerns with the bill as well. I might leave—

**CHAIR:** Sorry, there's an expressed position around amendments but not an opposition to them.

**Ms Tinsley:** Sorry, that's why I said, in terms of the Human Rights Commission—

**CHAIR:** I think you need to make a clarification.

**Ms Tinsley:** there were concerns raised that reflect—

**CHAIR:** Yes, amendments proposed. That's why we have these hearing processes. Deputy Chair, I'll hand the call to you.

**Senator SCARR:** Ms Tinsley, there were in fact substantial concerns raised by the Human Rights Commission, and I referred to those in my questions to the previous witnesses. I'd like to quote one of those, and that is this:

While the Commission understands the impetus to ensure certainty for applicants in their costs exposure, removing the court's consideration of reasonable settlement offers may have the unintended consequence of invalidating the effect of an early settlement offer and significantly impacting on alternative dispute resolution and settlement options prior to trial and the final determination of proceedings.

Would you agree with that statement by the Human Rights Commission?

**Ms Tinsley:** Absolutely. That goes to the core of our concern that the disincentive to settle disputes that this bill will have and that we believe is for the most part unprecedented in this country in the way the courts usually do determine matters of this kind.

**Senator SCARR:** Another concern of the Human Rights Commission is raised in paragraph 15 of their submission, in terms of referring to the court's ability to consider whether or not an applicant or complainant participates in conciliation processes. They say:

In expressly removing this from the court's consideration of an appropriate award of costs, the proposed reforms may significantly reduce the incentive for parties to take genuine steps to resolve a complaint and meaningfully engage in the Commission's complaints and conciliation process ...

Would you agree with that concern raised by the Human Rights Commission?

**Ms Tinsley:** Yes, Senator.

**Senator SCARR:** The Law Council of Australia propose what they refer to as a 'broad discretion approach'. Could you take on notice your views with respect to that broad discretion approach proposed by the Law Council of Australia and provide your thoughts with respect to that as a potential alternative model going forward.

It seems to me when you look at the legislation as a whole that no distinction is made between a multibillion-dollar corporation with an internal legal department and resources at its disposal and a cafe owned by someone with three or four employees who's just come out of the COVID pandemic and is trying to keep their head above water. They're both treated essentially the same. Is that your interpretation?

**Ms Tinsley:** I would agree with that proposition, yes. A key issue that we have with this bill is that it doesn't, as you say, take into account the resources available to, say, a small business. I think that that is important, the justification that proponents of this bill tend to have about the balance between the applicant and the respondent. It's not always the case. As you say, that power imbalance will exist.

You mentioned before the Law Council's proposal—and of course we'll come back to you on that on notice. We generally do support any model that gives the court greater discretion, which is currently the case under the current common law approach of cost following the event, where the court is able to consider the merits of a particular cost application and take into consideration these sorts of matters when deciding whether to break from the usual default position of cost following the event.

**Senator SCARR:** One of the reasons I made that comment about no distinction between a multibillion-dollar corporation and a cafe is that the explanatory memorandum explicitly says if you're an employee of someone then almost ipso facto you're considered to be at a disadvantage in a power context, which is one of the threshold tests. That's correct, isn't it?

**Ms Tinsley:** Yes.

**Senator SCARR:** This is my last question, because we've got very limited time and I want to give my colleagues a chance to ask questions. You raised a particular concern with respect to class actions and representative actions and the fact that if a collateral, if I can put it that way, or a part of a claim is made on the basis of any discrimination legislation—it might also be made under the Fair Work Act—then that will attract the benefit of this new proposed cost regime for the applicant or the representative body, which might be, for example, the ACTU or a major union with the benefit of all of their resources. That again is a different situation from an individual applicant bringing a claim with respect to their own particular circumstances, which, again, I would have thought should go to the discretion of a judge or the court in terms of making a determination. Could you just elaborate on your particular concerns with respect to how these proposed provisions could raise issues in the context of class actions, representative actions and actions which are brought both under the Fair Work Act and any discrimination legislation?

**Ms Tinsley:** In terms of the proposition or the point that you've raised about different proceedings in terms of beyond just sexual harassment matters, we note that it refers to the proceedings involving matters raised under the Australian Human Rights Commission Act. That's just 'involving', so as long as there's a claim being made within that jurisdiction, anything else can be joined. We often see that a discrimination matter will be joined with a matter under the Fair Work Act—for instance, an unfair dismissal type claim—so we have concerns that it will apply more broadly because of the language in the act.

In terms of the broader concern about class actions, as you've already mentioned our concern there arises from the incentive that this almost creates for parties to be, let's say, a little bit more risky in terms of the proceedings. It may be that a claim is lacking merit. That's not to say that the applicant doesn't believe that they have a genuine complaint—a complaint they feel is very real—but it doesn't actually reach the benchmark of, say, actual discrimination under the act. They will be more likely to run a matter knowing that there's a very low chance that, even if they are unsuccessful, and when they're unsuccessful, that a respondent will not be able to have costs awarded against them. So that becomes very attractive.

We know that class actions and representative claims are possible in this jurisdiction, within this framework, and we also know that plaintiff law firms will often operate and take a lot of these cases on, on a no-win, no-fee basis. So it's that combination of no longer having the disincentive of running claims that are lacking in merit, so to speak, in addition to just generally how we know the framework works.

**CHAIR:** Thanks, Deputy Chair. Senator Waters, I'll come to you in a second. I just have a couple of questions. The Attorney-General's Department conducted a lengthy public consultation on the process to determine what an appropriate cost model would be. Did you make a formal submission to that inquiry?

**Ms Tinsley:** I believe this predates my time at ACCI, but I believe we did provide a submission, which I believe is referenced in our submission at page 4.

**CHAIR:** So you didn't get involved in that consultation or provide a submission?

**Ms Tinsley:** No.

**CHAIR:** Okay.

**Ms Tinsley:** Sorry, my understanding is ACCI provided a submission, but I wasn't personally involved in that.

**CHAIR:** Could you take that on notice and check, because I'd like to know what that submission said about the costs at the time. In your submission to this inquiry, though, you're quite critical of an equal-access cost model. That was one of the models that was being discussed in the consultation. What concerns did you raise about that cost model through that consultation process?

**Ms Tinsley:** In terms of the department more recently?

**CHAIR:** Yes, with the consultation that has been ongoing for almost 12 months.

**Ms Tinsley:** We raised the same concerns that are reflected in our submissions. We provided those verbally to the Attorney-General's Department.

**CHAIR:** Verbally, but not in any written form that we can see.

**Ms Tinsley:** No.

**CHAIR:** In terms of the *Respect@Work* report, does ACCI support recommendation 25?

**Ms Tinsley:** You'll have to remind me, Chair—is that the cost model? Our primary position is that we would prefer to see no change to the existing way that costs are dealt with. The costs should follow the event, noting that that provides the courts with a broad discretion to decide these matters on a case-by-case basis. In the alternative, we would prefer to see what was recommended by Ms Jenkins in her *Respect@Work* report to what is being proposed in this bill, which we believe to be different.

**CHAIR:** I don't want to get into semantics here. For recommendation 25, I think the position is that there's broad support for that recommendation from most submissions. There's support for the bill, which is separate to that, and then there are certain submitters that support the model that's being put forward or would like amendments to be made. I'm trying to understand where you are in that line of opposition to what we're talking about. Is it just the model? Is it bill itself? Is it the recommendation? From what I understand, you oppose not just the model that's being put forward but the bill in its entirety, as well as, from what you're saying, recommendation 25 altogether.

**Ms Tinsley:** Recommendation 25, just so I'm clear, is the cost element to it?

**CHAIR:** It is the cost protection provision.

**Ms Tinsley:** Our position here is that we believe that the model put forward in the *Respect@Work* report is different to the model that is proposed in the bill. The reason we oppose the bill is that we oppose the model within the bill, which we say—

**CHAIR:** You would support recommendation 25 then?

**Ms Tinsley:** We support it in the alternative. Our primary position is that we would prefer to see no change in this area—that costs should follow the event. In the alternative, we would prefer to see and would be more likely to support the model put forward by Ms Jenkins in her *Respect@Work* report, which we submit is different to the model put forward in this bill. In a way, you could say that we would—we've consulted our members on this—prefer to see the model put forward in the *Respect@Work* report, which is recommendation 25.

**CHAIR:** But your preferred approach is the status quo.

**Ms Tinsley:** Yes.

**CHAIR:** No problems. The status quo at the moment in workplaces in Australia is 41 per cent of women being sexually harassed. That's the status quo.

**Ms Tinsley:** That's something we obviously don't support.

**Senator SCARR:** To be fair, Chair, I don't think our witness was saying that she supported that. It's with respect to costs.

**CHAIR:** No—

**Senator SCARR:** It's with respect to costs. I don't think that was fair.

**CHAIR:** Senator Scarr, before you interrupted me and before you spoke over me, what I was going to say is that's what's happening in workplaces. This is part of a recommendation on a broader scheme to stop that from happening. We've heard that this is the final piece in the puzzle. You say that the reforms that are being enacted can achieve a reduction in sexual harassment without this cost provision.

**Ms Tinsley:** To the best of my recollection, the *Respect@Work* report includes 55 recommendations. This is one aspect of it. Again, we're more likely to support the recommendation in the *Respect@Work* report. I think that that would be a better model, noting that the difference there is that it reflects what we already see in employment legislation of the Fair Work Act, where both parties as a default pay their own costs—either party. This is why we would prefer what Ms Jenkins has recommended to what is being proposed by the government in this bill, primarily because it treats both the respondent and the applicant equally. It also provides a broad discretion for the court to determine case by case what's in the best interest within that particular case. What we're saying is: 'Yes. There may be cases where it is appropriate, even in those circumstances, for it to be preferable that the respondent should have costs awarded against them.' We're not saying that's not the case. What we're saying is that we'd prefer any model that gives that discretion back to the courts to have all the information in front of them and be able to make that decision for themselves. But this model takes that discretion away from the courts, and it has a situation where, pretty much in all cases, the respondent will always have to pay costs. Then, in the alternative as well, they're almost definitely never going to be able to have the costs awarded against the applicant.

We think that it's not fair for a piece of legislation to make assumptions, which I think is the problem with what this bill does; it makes the assumption that an applicant is always going to be one way and the respondent will always be the other. We're just saying that we prefer a model—which is what the *Respect@Work* model is more likely to do and has worked well in terms of the fair work regime and employment laws—that gives that discretion to the court.

**CHAIR:** Okay. I think we disagree on the characterisation of the exceptions and discretions in the provisions, but I have to hand the call over to Senator Waters.

**Senator WATERS:** Thanks to you both for coming along in person. I just want to start off by clarifying that I strongly disagree that this bill treats a large corporation the same as a cafe. That is the whole point of this bill. It's not an equal access costs model; it's a modified equal access costs model, and those modifications mean that frivolous or vexatious claims are an exception. And it also says that the court has to look at either the power imbalance, the financial imbalance or, in this case, whether there is an imbalance. So I'm struggling to understand why you said in your opening statement that you think that's an exceptionally high threshold, and I'm also struggling to understand why you say that treats small businesses differently to big businesses, because in my mind the issue that you've raised has been addressed by the modifications in this bill. Can you just address that, and then I have a second question.

**Ms Tinsley:** Sure. What you say is a good point. It was something that, as I finished my evidence to Senator Scarr, I did recall. We do have things in circumstances where the court is satisfied that one of the following exemptions applies, and I'll just quickly run through them. The applicant may—and I think that's a key word here, 'may'—be ordered to pay the respondent's costs, and here we know this is vexatious and we know it's an unreasonable act or omission. Then, critically, what you're talking about here, Senator, is a situation where all of the following factors are relevant: the other party's a respondent who was successful in the proceedings; the respondent does not have a significant power advantage over the applicant; and—this is something which you're specifically referring to, Senator—the respondent does not have significant financial or other resources relative to the applicant. I think the key here is that it requires all three to be true.

So it's not just the case that the respondent doesn't have significant financial or other resources; it has to also be the case that the respondent does not have a significant power advantage over the applicant. It's difficult to see a situation where the court would find that the respondent, even if it is a small business, wouldn't have a significant power advantage over the applicant, which essentially means that the financial or other resources consideration doesn't really come into play in most cases. We think that this particular exemption, which you're quite rightly saying that a respondent, a small business, might try to rely on, won't have much luck in the vast majority of cases.

**Senator WATERS:** Okay. Thanks for that clarification. I don't agree that an employer, just because they're a small business, can't have a power advantage over an employee. That's the whole point of an employment relationship: one person's the boss and one person's the staff member. I think we'll probably have to agree to disagree on that.

**Ms Tinsley:** Senator, I think we're making the same point there. We're saying that in pretty much all cases a court's likely to find that a small business does have a power imbalance over an applicant, so we're in complete agreement there.

**Senator WATERS:** Okay. Well my view remains that they're perfectly ample protections. I think we'll probably not reach agreement on the need for further protections for small business, which leads me to my second question. Rather than attempt to increase the barrier for applicants to be able to pursue justice and enforcement of the law through the courts, what is ACCI doing to help your members understand what their legal obligations are to provide a workplace free of sexual harassment for their workers? Can you outline for me how you're actually helping them to prevent this stratospherically large problem from happening in the first place.

**Ms Tinsley:** The recommendations that have been implemented through the *Respect@Work* report are clearly very substantial. We've seen the positive duty only come into effect quite recently, and a whole range of other recommendations are over a number of years. ACCI provides resources for our members who are for the most part industry associations but also some large corporates as well. We provide training and resources in terms of guidance for our members. We're also a member of the Respect@Work Council, so we've been actively involved in the development of guidance that the Respect@Work Council has released. We're quite proud of the role that we're playing in helping businesses deal with these new laws in an attempt—and we're all on the same page here—to try to stamp out and eradicate sexual harassment in workplaces, which is a really important issue.

**Senator WATERS:** Do you agree that part of stamping out sexual harassment in workplaces is allowing people to enforce the law where they have been sexually harassed and to be able to enforce those rights without huge disincentives, including the uncertainty about costs orders?

**Ms Tinsley:** It's certainly the case that enforcement of the laws that businesses will need to comply with, especially around the positive duty, is important. Of course applicants, or people that have been unfortunately the victim of sexual harassment, should bring these complaints forward and have their lawful right to have it heard by a court. We just don't believe that the model put forward in this bill does what it's meant to do, and it will have seriously unintended consequences.

**Senator WATERS:** I don't have any further questions at this stage.

**CHAIR:** I think that's all the questions we have for you today. Thank you for your appearance and for your submission.

**BANKS, Dr Robin, Member, Australian Discrimination Law Experts Group [by video link]**

**BLACKHAM, Associate Professor Alysia, Member, Australian Discrimination Law Experts Group [by video link]**

**CAMPBELL, Ms Leonie, General Manager, Policy, Law Council of Australia**

**EASTMAN, Ms Katherine, AM, SC, Chair, Equal Opportunity Committee, Law Council of Australia**

**MARCUS, Mr Shaun, National President, Australian Lawyers Alliance**

**McINTYRE, Mr Greg, SC, President, Law Council of Australia**

**SWANNIE, Dr Bill, Member, Australian Discrimination Law Experts Group [by video link]**

[14:07]

**CHAIR:** Welcome. Thank you for taking the time to speak with the committee today. I believe information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. I think you'll all appreciate that it's a pretty extensive panel and we're very short on time. I'm very happy for very brief opening statements. We've got some that have been circulated, though, so, if you don't mind, if we can have the benefit of those and skip over opening statements that might be helpful to get straight to questions. Have I got broad agreement on that?

**Senator SCARR:** Very helpful!

**CHAIR:** Thank you very much. We have read your submissions, and we do have the opening statements in front of us. You'll get a chance in answering questions to raise any of the issues that we might have skipped over.

**Senator SCARR:** Firstly, before I forget, I would like to ask the witnesses apart from the Law Council of Australia to take on notice and have a look at the Law Council of Australia's broad-discretion approach to costs, which is covered in paragraphs 93 to 105 of the Law Council of Australia's submission. I just want to give you all an opportunity to provide your thoughts with respect to that particular proposal. I won't seek your thoughts at the moment, but I would like to put that on notice for you. Thank you.

First, the Law Council of Australia, I want to quote to you from the submission of the Australian Human Rights Commission. In relation to the treatment of settlement offers in the context of complaints which are raised in this jurisdiction, they say:

While the Commission understands the impetus to ensure certainty for applicants in their costs exposure, removing the court's consideration of reasonable settlement offers may have the unintended consequence of invalidating the effect of an early settlement offer and significantly impacting on alternative dispute resolution and settlement options prior to trial and the final determination of proceedings.

Before I get you to respond to that, I also want to allude to the fact that some previous witnesses have referred to the fact that, in a litigation context, respondents may use settlement offers in a way to apply pressure to complainants and applicants. That was a concern that has been raised by some of the witnesses. So I would like your response to the concern raised by the Human Rights Commission.

**Mr McIntyre:** We agree entirely with what the Human Rights Commission has said, and, if settlement offers are being used oppressively, then that can be taken into account in our discretionary model.

**Senator SCARR:** What would be an example of that? How would that be taken into account? Where do you think the line is between a settlement offer made bona fide with the view to resolve a matter as early as possible, as opposed to a settlement offer being used in an oppressive manner?

**Mr McIntyre:** It would depend upon the particular facts of the case, I think. That's why we say it needs to be left to judicial discretion to identify that. It may be quite difficult to identify that.

**Senator SCARR:** But that's one of the reasons why in your submission the court needs to have discretion, because the circumstances can be as different as the number of cases appearing before the court.

**Mr McIntyre:** There's case law in an area I practise in, native title, of good faith negotiations. It's in industrial law everywhere. If the negotiations are not in good faith then they're tainted. That's what will happen when the cost assessment is made if the offer is an unreasonable offer. If it's an unreasonable offer, it's not unreasonable to reject it. Ms Eastman might have something to add to that.

**Ms Eastman:** I'll give you a practical example. The whole process of the Human Rights Commission is to try to assist the parties to reach a resolution themselves, and in the course of that there may be settlement offers. Some of those settlement offers may include financial components, but some may include a whole range of other

types of outcomes. One difficulty for an applicant is that, if she or he doesn't receive a settlement offer during the course of the commission's processes and has to commence their proceeding in the Federal Court, then the absence of a respondent making a settlement offer is an important factor to take into account.

The corollary is that, if a respondent makes an offer in the course of an AHRC conciliation proceeding that might meet what the applicant is seeking, the applicant may then think, 'Look, that's a pretty good offer, but I'm going to reject this, because I might be able to try my chances in the Federal Court or the Federal Circuit Court to achieve something more.' Or it may be that the offer that the respondent puts to the applicant doesn't succeed at the same level in the court. In those circumstances, the court should be able to take into account the fact that an applicant has rejected a reasonable settlement offer in terms of any assessment of costs at the end of the day. So the current section is taking into account the settlement offers on both sides. It's not a one-way provision at the present time. So that's an example of how it would be taken into account.

**Senator SCARR:** I might just tease that out a little bit, and then I want to give our other witnesses an opportunity to respond to the Law Council of Australia's submission in that regard. Another point that's been made is in the context of settlement offers and confidentiality or gag clauses or orders. A respondent may well put forward a settlement offer. It's got a financial component, but it also has a confidentiality component or gag order, and the applicant—the complainant—may well, in the public interest, want there to be public ventilation of the fact that they've brought this claim against a respondent. And it may well be important for other people within that organisation to be aware of that because they may be in similar situations. So the first subset of questions is about how that should be considered in the context of the discretions. The second subset relates to settlement offers. There are a wide range of settlement offers. You could have a Calderbank offer which says, 'We offer you a hundred thousand dollars,' but someone goes to court and gets \$90,000, which is just under the settlement offer, or there could be a settlement offer of \$5,000, and someone goes to court and gets a hundred thousand. So there's a huge discrepancy in the settlement offers that may be made during, say, the conciliation process and the judicial outcomes. I ask you to address your thoughts to those two issues. Then I would like to give our other witnesses an opportunity to give their thoughts on this discussion.

**Ms Eastman:** I'll be very quick. The question of confidentiality or gag orders or non-disparagement clauses in settlements is the subject of a separate recommendation in the *Respect@Work* report, and separate work has been done on whether or not those clauses should be included in all settlements or whether there has to be a good reason. I think there has been a lot of work done on that issue, which is separate from the question of the rejection of a settlement offer for the purposes of assessing costs. You're quite right that the range of matters that might be offered as part of settling a complaint can be wide and varied. Much of the discussion this afternoon has focused on sexual harassment and employment claims, but this provision will have operation across the board. For example, a claim concerning a young person with disability and access to school and being able to achieve the adjustments that they need to participate in school could be the outcome of a settlement. It could be in a First Nations matter. If there's a race discrimination complaint and it involves the provision of services in remote First Nations communities, the money might be an issue, but it might be more systemic issues in terms of changing policies, practices and procedures. Because it's the nature of this legislation to cover a wide range of different forms of discrimination, we have to be careful not to look at it simply through the lens of financial compensation and employment cases. There's a lot of work that this legislation can do, so settlements are wide and varied. What the parties can achieve in their own settlements may be far broader and far more effective than the limited options that are available when a matter gets to court, and that's set out in section 46PO(4) of the AHRC Act.

**Senator SCARR:** Mr McIntyre, did you have anything to add in that regard?

**Mr McIntyre:** It really just adds to why we've settled on the broad discretion model, because there are such a broad range of things that may need to be taken into account. There may be good reasons for rejecting a settlement offer if it's based on a concern about publication, for example.

**Senator SCARR:** I'll give an opportunity to our friends from the Australian Discrimination Law Experts Group to provide their views on those issues I've raised. I'll go to you first, Dr Banks.

**Dr Banks:** I will defer to my colleagues, but I would note that the Law Council's proposed model is that there be no change but that there be more guidance on the discretion. We would certainly reject that as an appropriate response to the current situation. The evidence is very strong that complainants are significantly disadvantaged in these matters, including to the extent that they are much less likely to be represented. The Law Council proposes that the court would be required to hear parties on costs. That presumes the parties have the capacity to give sensible costs submissions or expert costs submissions and, when 50 per cent of complainants are unrepresented in these proceedings—which is about the current levels—the chances of that are very low. One of the benefits of the proposed approach is that there would be, we would hope, an increased level of representation for

complainants and, therefore, more expertise in the proceedings. As such the courts would be wasting less time in the processes, and they'd be much more likely to be getting sensible submissions and appropriately referenced submissions on costs. And—

**Senator SCARR:** Dr Banks, I just want to tease out that point you raised. Why should successful respondents—say, a successful small business cafe owner for employees—have to bear the burden of costs because the Commonwealth does not provide adequate legal aid support to applicants?

**Dr Banks:** All they'd be required to do would be to bear the burden of their own costs, and that's a deductible expense. Complainants in discrimination matters have no tax-deductible benefit compared to any business respondent. For business respondents, these are legal expenses that are incurred in the course of business. It already creates a financial imbalance in the way in which these laws operate. At present they entirely rely on individuals from the most disadvantaged communities in our society to enforce what is a fundamental principle of equality in society. So yes, a small business—although they are not by any means the majority of respondents in these cases—could be required to bear its own costs. It would be very unlikely that it would be ordered to pay costs to the complainant if it was successful.

**Senator SCARR:** But not just bear its own costs, Dr Banks—bear its own costs in circumstances where it has been successful in terms of defeating a claim. It may well have engaged in good faith in a conciliation process to resolve the claim. It may well have made a settlement offer to try and resolve the claim. In all those circumstances it's still left carrying the bag. Don't you recognise that that could lead to injustice?

**Dr Banks:** It could, and that's in part why we've suggested there should be a review built into this legislation to test how it operates. It's an unknown. We know how the cost neutrality type rules operate in the state and territory jurisdictions. They have not made a significant difference to access to justice for the most disadvantaged people. And I note that the Law Council identified in its report on access to justice that many, many groups—all of which are considered under discrimination law—are very significantly disadvantaged in terms of access to justice. This bill goes some way to increasing access to justice in an area where individuals are being asked to pursue action that is to achieve a public good: equality and nondiscrimination. It seems at the moment that all the weight is on one side.

**Senator SCARR:** I want to give Mr Marcus an opportunity.

**Mr Marcus:** The ALA says that the broad discretion model of the Law Council of Australia will just simply retain the status quo, and the status quo is unacceptable. The bill provides certainty about costs for victims seeking to engage legal representation. It would be entirely speculative, under the broad discretion model and the current model, in terms of why so many applicants are unrepresented. This bill aims to correct the power imbalance which currently arises.

**Senator SCARR:** This is my last question because I know, Chair, we are pressed for time. As a matter of practice, it seems to me that, if this legislation were adopted as it is, then any lawyer advising a client with respect to a possible sexual harassment claim or discrimination claim would advise them to move it to the Federal Court rather than to stay in a state jurisdiction. That's because, as I understand it, this kind of costs model is unprecedented in terms of state jurisdictions and tribunals and how they deal with costs. It seems to me that, if I were advising a client in relation to these matters, I would say that there would be material benefits in terms of moving to the federal jurisdiction as opposed to pursuing remedies through, say, in my home state of Queensland, the Queensland antidiscrimination commission and the Queensland Civil and Administrative Tribunal, or QCAT, because the cost benefits are so profound under the federal system. I'm interested in your views with respect to that.

**Ms Eastman:** I would say, respectfully, not necessarily. The question of which jurisdiction to start in—which is either state or federal, and then sometimes between competing federal models—is a factor that has to be taken into account. So, at a federal level, in relation to, for example, sexual harassment, you've got the option now of commencing a claim in the Fair Work Commission which is a no-cost jurisdiction unless there are special circumstances. So, for sexual harassment in employment related matters, an applicant has to consider whether to start at the AHRC or the Fair Work Commission and then also at a local state jurisdiction.

**Senator SCARR:** Correct—so there are three options.

**Ms Eastman:** And there may be other options as well, depending on the nature of the claim. So other factors become important. It might be the time taken to resolve the complaint. It may be the coverage of the relevant law and whether the relevant claims that need to be raised can be raised. It may well be that the costs factor is one factor but not the determinate factor. So I can't see that the end result would be that everybody would automatically rush to the Federal Court—or even, for that matter, to the Federal Circuit Court—and leave the

states behind, but these are tricky questions because we don't have a uniform approach to costs at all in dealing with discrimination and employment related matters.

**Senator SCARR:** Mr McIntyre, do you have anything to add?

**Mr McIntyre:** No, I don't have anything to add to that.

**Senator SCARR:** Thank you.

**CHAIR:** I have just one question, and then I'll hand over the call. I'm not asking you to give actual legal advice. I wouldn't do that, and you don't have facts in front of you. But, Dr Banks, let's get real here. When a client who has been sexually harassed at work comes to you, the harm is the same whether it's a small business or a big business. The advice that you have to give at the moment to your client is that it's a pretty difficult pathway to access justice. How will this bill change what you are able to say to those types of clients? What is the present status quo that essentially—to be fair, Mr McIntyre—the Law Council is advocating for?

**Dr Banks:** I start by saying that I agree entirely with what Ms Eastman was saying, in that it is not simply a matter of looking at what the costs regime is, but the costs regime definitely makes a significant difference to people's decision about whether or not to proceed with the matter. If they were here in Tasmania, does the Tasmanian Anti-Discrimination Act provide the same scope of protection? Is the respondent body caught by the state legislation? Of course if it were to happen in a federal government department—heaven help us!—you couldn't bring the complaint at the state level. So there are a range of factors that I would be speaking to my client about. I would be speaking, as Ms Eastman indicated, about the timeliness and how long it was likely to take. If it happened in employment, then obviously Fair Work does become an option and we would be looking at the conciliation and mediation processes that are available in both the human rights jurisdiction and the fair work jurisdiction and the effectiveness, from my perspective, of those processes currently, because the quality of mediation and the quality of conciliation do make a difference to whether or not complaints get resolved. Both respondents and complainants respond well to conciliation if the conciliation is conducted effectively, and that makes a difference as well. I'd certainly be raising that.

In my research on the effectiveness of discrimination law, which is the basis of my PhD, I spoke to respondent lawyers and experts across the country. I spoke to the statutory authorities. Pretty much everybody, I could safely say, recognised that this is not a simple one-stop shop. But, in terms of access to justice, removing the barrier of the risk of costs is clearly something that would make a difference to complainants in terms of whether or not to choose a federal jurisdictional approach. The fact that there are still people using the federal approach indicates that it's not the only factor. I actually would respond to the previous senator's comment about more cases in the federal jurisdiction. That's potentially beneficial because federal jurisdiction decisions are more likely to have a national influence on attitudes and practices than something that happens in the Tasmanian Civil & Administrative Tribunal I think that's possibly a really positive benefit if that is a possible outcome. We will get better all-of-Australia jurisprudence on not only sexual harassment cases but discrimination cases more generally.

**CHAIR:** Thank you. I will leave it there as I am conscious of time. Senator Waters, I wanted to give you an opportunity.

**Senator WATERS:** Thanks to all the witnesses for your time and all of the help that you give people in this field. Dr Banks, thank you also for clarifying that the costs to the respondent are tax deductible whereas applicants, of course, don't have that benefit. That thought occurred to me several hours ago, so I'm glad that you've confirmed it. It certainly sheds some light on the balance of power there. I also note your comment there that the soft cost model hasn't increased access to justice; ergo, we need a different approach. Can I please have your views on whether the modified equal access provisions in this bill—namely, the ones that have additional protections for businesses where there's not a financial or power imbalance—strike the right balance?

**Dr Banks:** Perhaps I should let one of my colleagues answer this, but, in short, it's a step in the right direction. I'd be very happy for Associate Professor Blackham or Dr Swannie to respond.

**Prof. Blackham:** I think the bill overall strikes the right balance from our perspective, though we and the Law Council have both argued that we should build some review mechanism into this to check how courts are applying these provisions over time. I think that's really important to ensure that we are promoting access to justice, that it's not leading to unexpected outcomes and that we can actually map what is happening. Overall, though, we think the bill strikes the right balance.

**Senator WATERS:** For clarity's sake: given the alternative provided by a handful of submitters—I think they called it broad access or the broad discretion model—can you talk about your view on the relative advantages or disadvantages of that model versus the one in the bill?

**Prof. Blackham:** The bill has the advantage of being very clear and offering additional certainty to people who choose the federal jurisdiction. I think what we could potentially tell people wanting to bring a federal claim now is that it is unlikely to bankrupt them if the bill is brought, whereas, under the current system, becoming bankrupt as a result of bringing a case is a very real possibility. We've seen a number of cases recently where the claimant has had to appeal because they were at risk of having costs awarded against them. Even though they were successful, they were at risk of being bankrupted by the costs award. I think we can say that the bill offers certainty whereas the proposed broad discretion model offers no improvement on the level of certainty around costs. There is still a very real risk for people that they will be exposed to very large costs orders against them if they are unsuccessful. Given the law is technical, given it is often unclear, given success is never guaranteed in the federal jurisdiction, that is something that is very likely to deter claiming, particularly for those who are the most vulnerable members of our community.

**Dr Banks:** Under the regime that we currently have, the rate of success in the federal system is around 10 per cent, and that's probably in part because people are unrepresented. It's very hard. It's a very technical law. It's a very hard law in which to set out your arguments to fit within all of the technical detail, and the rates of success are so low. Effectively, we're not enabling people to bring discrimination complaints at the federal level. It's sort of devastating, because of Australia's commitment under international law, that we cannot have a better and more effective mechanism in place.

**Senator WATERS:** I agree: what's the point of having laws on the books if you can't actually enable people to enforce their rights? I appreciate your general tick of the approach taken by this bill.

On the point you made that 50 per cent of applicants are unrepresented—I didn't realise it was quite that high—can you please add to or tell us about your submission's comment that you think we also need better funding for community legal centres and/or legal aid so that applicant actually have legal representation?

**Dr Banks:** I think it speaks for itself. The only piece of federal legislation where there was any additional legal aid made available was when the Disability Discrimination Act was enacted back in 1992. There was a legal aid impact assessment done, and specialist funding was granted to establish a mechanism for people to get access to advice. That mechanism has now effectively been rolled into general funding, and what we see is that, because it is such a complex area of law, we don't see the generalist legal centres having the capacity to assist and represent people. People are largely reliant on either doing it themselves or getting pro bono assistance and therefore relying on a charity model for their access to justice. We absolutely need a greater resource available to people to save the court's time, to improve the quality of the submissions made and the evidence presented and to improve access to justice.

**Senator WATERS:** Thank you.

**CHAIR:** Can I make one clarification so it's really clear for the *Hansard*? I want to understand the Law Council's point of view. You spoke about a broad discretion model, but that's the current status quo. That's what you're supporting?

**Mr McIntyre:** No, we wouldn't say it's the current status quo. For the discretion to operate, it would be appropriate for there to be guidance in the legislation as to how the discretion should be exercised. We have also mentioned that there may be some judicial education involved in understanding how it shouldn't be just the status quo. We are sympathetic to the disadvantaged and we are looking for a model which finds the right balance without appearing unequal. We don't accept the idea of it being clearly statutorily unequal. It needs to be, on the face of the legislation, equal and then redress the imbalance in power, which may exist in a particular situation, with properly set out discretionary criteria. It does require some development, and I should say that the issue of tax deductibility may apply in some cases but it won't apply with a senior academic sexually harassing a junior academic and it being between two individuals or to a whole range of other matters which don't fit that model.

**CHAIR:** It was brought up in the context of small business, I think, so that's okay. Can you give me a clear answer?

**Mr McIntyre:** Ms Eastman might be able to do it.

**CHAIR:** Yes. I just didn't understand. I'm not able to comprehend what you're saying.

**Ms Eastman:** Let me have a go. Mr McIntyre might jump in.

**CHAIR:** I asked a pretty clear question. What is your position?

**Ms Eastman:** The current status quo is that costs follow the event, with a discretion that rests in the courts in relation to costs and section 46PSA. To the extent that we say that the proposal will change the status quo to a situation where a respondent will never recover their costs, that's the subject matter of concern. If the court had

greater discretion in deciding whether or not the respondent should recover its costs in the event that the respondent is successful and the application has been dismissed, there should be a range of factors open to the court to take into account. That's the context of a broader discretion model.

**CHAIR:** But that's not what you would refer to as an equal access model.

**Ms Eastman:** Some of the shorthand language to describe or characterise these models, I think, is variable. They've been called asymmetrical or one-way cost models. So I wouldn't put too much in the word 'equal', because I think that's got different flavours of meaning to people.

**CHAIR:** Sorry; I will clear this up just because we've got to move on. That's the term that you used in your submission to the Attorney-General's Department. You said that the two options that attracted the most support from the profession are the equal access model and maintaining the status quo.

**Ms Campbell:** The submission in question also reinforced that we had had a lack of consensus across the legal profession, and the broad discretion model that we put forward in our submission here was not part of the mix that was considered then. I think it's also fair to say that, since it's become clear that the government is pursuing the equal access model in this bill, there has been a real strength of concern expressed to us from different parts of the profession, which is why, when we were approached about it towards the end of last year, we indicated to the AGD that we needed extra time to reach a Law Council position taking into account the views that we've received, and our executive did that just before Christmas.

**CHAIR:** It's important to put on the record the presumed change in position, but we do have to move on.

**Mr Marcus:** If I could add one thing.

**CHAIR:** Of course, Mr Marcus.

**Mr Marcus:** If you put yourself in the mind of a victim of harassment, who is obviously very regularly suffering from mental health injury and normally suffering from financial disadvantage because of a lack of employment, as often these situations arise, the effect of an adverse costs order looms absolutely large. The current status quo and the broad discretion model will do nothing to alleviate that when seeking to engage legal representation.

**CHAIR:** Thank you, Mr Marcus. Thank you to all of our witnesses. We need to move on to our next panel. Thank you very much for your submissions.

**FEEHAN, Ms Caitlin, Lawyer, Working Women's Centre SA**

**GOLLEDGE, Ms Emma, Director, Kingsford Legal Centre, UNSW**

**KASSISIEH, Mr Ghassan, Legal Director, Equality Australia [by video link]**

**KENDALL, Ms Abbey, Director and Principal Solicitor, Working Women's Centre SA**

[14:40]

**CHAIR:** I now welcome representatives from Equality Australia, the Working Women's Centre SA and the Kingsford Legal Centre. Thanks for taking the time to speak with the committee today. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. As you can see, we are running behind time. We have some opening statements. They have been tabled. With your agreement, we'll go straight to questions and then any of these issues can be raised through the questions you'll be asked.

**Senator SCARR:** I'll ask Equality Australia some questions first. It's good to see our friend Ghassan--happy new year. I'll give the other witnesses an opportunity to provide comments in relation to these two questions I have for Equality Australia. I want to deal with two issues that haven't been raised previously in this discussion. The first is from page 4 of your submission in relation to symmetry with respect to knowledge—that someone who brings a claim in these sorts of jurisdictions might be at a disadvantage from a knowledge perspective. What are your thoughts on how that impacts what we should be considering? Could you expand on that, please?

**Mr Kassisieh:** The knowledge point comes about because the burden of proof of many of the elements of discrimination and the defences rests with the respondent. So when you are seeking to file a claim of discrimination, you don't always know, for example, any other reasons that the alleged discriminator has had for taking the action that they did. And because discrimination law is so factually dependent often on comparisons being made between, for example, what happened to you and how they've treated other employees or other students, you might not have that knowledge until the matter is actually on foot and they've raised it in their defence or later in their evidence. I'll give you an example. You believe you've been terminated because of your sexuality. You might have a letter that terminates you but not for those reasons. You won't necessarily know anything behind the letter or what considerations they took into account that aren't in that letter. You also won't be able to know who else they've terminated and what the basis for their terminations was to be able to create a comparison as to whether you were treated less favourably than someone else in the same circumstances that you were in. Those are the sorts of things that are often in the respondent's knowledge, not in the complainant's and might not be in the complainant's knowledge upfront. So there is a degree of risk in starting a discrimination complaint when you don't know what the response will be and you also don't bear the burden of proving those elements.

**Senator SCARR:** Couldn't that be addressed through (a) other procedural means or through (b) the court considering that situation you've just outlined, that the complainant wasn't aware of all the information at the time of bringing the claim, going all the way through conciliation, and potentially mediation, to trial. Shouldn't that also be something that a judge should have the discretion to consider in terms of whether or not a defendant has acted reasonably?

**Mr Kassisieh:** Yes, they do. They've got the ability to take into account those considerations, but you've already filed the matter at that point. So, if you're talking about a complainant and whether they bring an action in the first place, that lack of certainty over what will happen if a defence is raised won't arise until after the matter has been filed. And there's nothing to require a respondent in conciliation to put forward their case early, because—and I've advised respondents as well as complainants on this area—you might not want to put your case early because you don't know whether or not the complainant will accept an offer that doesn't require you to go to that effort of, for example, building a defence. You might want to deal with it on a more informal basis at that earlier stage. It's at that stage that you make a decision whether to file a complaint or not, and, at that point, once you've filed, you've already expended costs for yourself and you're at risk of being forced to pay the costs of the other side if you withdraw the matter.

**Senator SCARR:** I'd like to give our other witnesses an opportunity. Do you have anything you want to contribute to that debate. Ms Golledge?

**Ms Golledge:** Yes, I totally agree with the point from Equality Australia. It happens all the time. We don't know how defences might operate until people file in court—for example, the broad defence of unjustifiable hardship. You have respondents going to conciliation saying, 'We're totally justified in our behaviour because of unjustifiable hardship,' and you don't know, as an applicant, what that was, what the documents were and what the

reasonings were for the decision, and that's because we don't have model litigants in this area. We don't have full disclosure until we're accruing costs.

To the broader point: can we fix this? Yes, we can. This goes to broader discrimination law reform around a reverse onus of proof, which should also operate. The onus should really shift to the respondent to prove they didn't have a discriminatory motive. Too much is on the applicant, but we're not focused on that today; we're just trying to increase access to justice for people who don't have information to make these really technical decisions about the strength of their case. Everything will hinge on this information, which you won't have.

**Senator SCARR:** Ms Feehan and Ms Kendall, do you have anything you want to add?

**Ms Kendall:** We agree with those submissions.

**Senator SCARR:** Again, I'll lead with Equality Australia and then give everyone an opportunity. My second point is on page 5 of your submission. It reads:

We also think that having more cases go forward to judicial determination would pay dividends for future complainants and respondents alike, as we get more clarity on the law in this area which is still underdeveloped and generally underutilised.

On an intellectual basis, I understand what you're saying. I'll put the two propositions to you, and I'm interested in hearing your response. First, with the economic cost of flushing out these issues and these precedents and getting these precedents, which are in the public interest, isn't there an inequity, potentially, in that cost being borne by a limited number of successful respondents who are deprived of getting their costs met as compensation for the fact they've had to go to court and incur costs? Shouldn't that be a cost that is borne by the wider community as opposed to respondents who may well have been successful but simply can't get their costs because of the way this scheme works? Second, shouldn't the focus of the system be—well, for the issues not to arise in the first place, which should be the goal—where at all possible, to get these matters resolved at the earliest time possible rather than them entering into the court system?

**Mr Kassisieh:** I have so much sympathy for everything you've said. That's been part of the reason why coming to a position on this is quite difficult, because you do have to make decisions based on the system we have and the reality of who's before it.

In terms of the sharing of the costs, discrimination law is unique in that in most cases there is no prosecutor apart from the individual complainant, so you are relying, effectively, on those individuals and the respondent in those individual cases to make the case for a change in standard across the board. Unfortunately, that is the system we have, partly due to constitutional limitations but partly due to the decisions that have been made to put it in the context that it has been put through a requirement for going from individual complaints through to courts, and dealing with discrimination in that way rather than on a more systemic level.

We would also advocate to see some changes that would allow the regulator in this space—the commission—to have more powers to undertake investigations on a more systemic basis and to make recommendations and binding recommendations. Those sorts of mechanisms could improve access to justice and share the cost. But at the end of the day, you will still have complaints, and the reality is that when you look at the respondents who are typical and the complainants who are typical, we've made the assessment that one side is more likely to be at a disadvantage than the other in relation to financial resources and other resources like insurance.

What this bill does is establish a general rule for the typical case. We also support it because it has those safeguards if the parties are not as unmatched in their capacity. That's dealt with in the subsection that deals with significant imbalances in power and financial resources. There is an element of discretion that allows the equilibrium to be centred in a different way if the circumstances demand it, but, generally speaking, these are cases where one side is going to be an employer, an educator or a goods and services provider because they're the duty holders, and the complainant is likely to be an employee, a student or a consumer—a user. Because there is no systemic way to prosecute these matters that shares the cost, someone is bearing them. When you have that equation, we think that an individual isn't the person to bear those costs, when an employer or an educational institution or a goods and service provider is going to be better placed, in most cases, to bear those costs.

**Senator SCARR:** Thanks. I'll go to you Ms Kendall, for your view.

**Ms Kendall:** We absolutely agree with that submission, and also make the point that to date it's been Australian women who have been bearing the cost of pushing cultural and judicial change. We see this bill as an opportunity to balance out those power imbalances between respondents and applicants, particularly because the respondents, employers and individuals—but let's take employers for the moment—already have an onus and already have a responsibility to provide safe workplaces, which comes from uniform work health and safety legislation across the country.

Going back to the original question around should it be these sort of innocent, I suppose, employers bearing the cost of moving judicial reform, moving our common law form and moving cultural change, we think it should. Further to that, in our experience there are very few employers who are entirely innocent. In our view and in our experience, most employers are not taking the steps to prevent sexual harassment, and at times taking actions that accelerate and/or foster cultures of discrimination and harassment, and then not handling the complaint well I don't think it is helpful to think about the entirely innocent respondent that might be dragged through this proceeding all the way through to a hearing, because it's a very uncommon circumstance. I can't think of one that we've seen at the Working Women's Centre.

**Senator SCARR:** Ms Golledge?

**Ms Golledge:** I think it's important to remember that broad cost to the community that *Respect@Work* laid out. We've got a real focus now on what's going to happen to respondents. We're very concerned about the smaller to medium end, and I think there's been a lot of evidence around that, but there's a huge cost to employers anyway. It's \$3 billion a year, I think, that *Respect@Work* talks about.

Because of those practices that Ms Kendall's just referred to, people's houses aren't in order. We haven't taken this seriously. We need to develop a cultural ecosystem at every level and, as much as it goes against alternative dispute resolution processes, litigation and having matters ventilated in court is part of that process. We still want really strong confidential conciliation processes in the role of the Human Rights Commission, but we have to build a system where people who have cases aren't settling in an oppressive way because of the spectre of costs, which is what's happening at the moment.

**Senator SCARR:** Ms Golledge, I've got one more question. I anticipated that the chair was about to—

**CHAIR:** I think Senator Waters has a question.

**Senator SCARR:** Absolutely. I want to give Senator Waters an opportunity, as a fellow Queenslander—it's all Queenslanders here on this panel, everyone.

Ms Golledge, I tend to delve into footnotes when I read the submissions.

**Ms Golledge:** Yes.

**Senator SCARR:** I thank you all for your submissions; they were very detailed and very helpful. I'd like to go to your submission where you refer to footnote 31. This is the area where you say:

... the research of Thronton et al, shows that even when applicants win they are ordered to pay the respondents costs in 10% of cases.

You give the footnote with evidence of that. To what extent do we know what the reason for that is, amongst the 10 per cent? For example, was it settlement offers that were rejected, or was it something else that triggered the court to make that decision? I'm happy for you to take it on notice.

**Ms Golledge:** I don't think, from the research paper, we have that level of detail, but that report talks about really low damages in discrimination matters.

**Senator SCARR:** Sure.

**Ms Golledge:** When we're talking about costs today, we're not even talking about damages that go to the client; we're talking about legal costs that go to the lawyers. The reason this is interconnected is that people are getting damages that are less than their legal costs. We have very constrained damages for really egregious behaviour, and the reason why applicants, even when they win, are finding the system is against them is the impact of Calderbank and settlement offers. That's why that carve-out is in the bill at the moment.

**Senator SCARR:** If anyone's listening who knows, let me know.

**Ms Golledge:** I'll take it on notice, but I don't think they actually delve into what that 10 per cent was.

**Senator SCARR:** Okay. Ms Kendall or Ms Feehan, do you have any insight?

**Ms Kendall:** No.

**Senator SCARR:** Ghassan? No? Okay.

**CHAIR:** Why don't we go to Senator Waters, who is just about to head off and do some parenting?

**Senator SCARR:** Certainly.

**Senator WATERS:** Thank you, Chair. Yes, I have to apologise to the remaining witnesses. I've got single parenting duties that I am proud to be doing, so I will be leaving you shortly. Firstly, thanks for the work that you both do, acknowledging that we've heard from some witnesses today who predominantly would represent respondents. It's lovely to hear from lawyers and legal practitioners who predominantly act for applicants.

I have the same question for both of you. Can you please outline why you think the modified equal access cost model proposed by this bill helps to level that power imbalance between employers and communities who have historically and traditionally been discriminated against and disadvantaged on the basis of their gender, race or sexual identity—the works.

**Ms Kendall:** What might be helpful is to take you through what generally happens at the dispute resolution process, for applicants and for vulnerable people in our community. I think that really tells the story of why this bill is so important and how it's going to assist us. At the Working Women's Centre, we bring sexual harassment and discrimination matters every day. We do it in both the state and federal jurisdictions and, just recently, in the new Fair Work Commission jurisdiction. No matter which jurisdiction we're in, we often go to the conciliation process, put forward strong arguments—because our clients often have very strong cases and they are, of course, represented by very competent lawyers—and are met with either radio silence—so no offers—or offers that are so low they're offensive. What is happening is that employers and individual respondents are being advised that they should just test the applicant to see if they go to the next stage, because presently the employer has all the resources, time and energy to be able to get through a conciliation conference and just see if the applicant gets through to the Federal Court or the next step, whatever it might be.

So what we need is to be able to actually bring the respondents to the table at the dispute resolution stage, and in order to do that we need some impetus. We need a financial risk to the employer, to the respondents, and we need them, at the earliest stage possible, to take the claim seriously and to actually come to those conciliations in good faith to resolve the issues.

I note that a number of submissions to date have talked about how this might impact the dispute resolution process. In our view, workers who come to us, predominantly women, are not going to skip over that dispute resolution stage to run a long, arduous, time-intensive litigation process which is likely to make them sicker, in lieu of going to a dispute resolution process where all parties come to the table, recognise the seriousness and have risk in that situation.

I also think that, if we were to take into account some of the submissions about applicants or complainants not accepting reasonable offers, we would be moving into territory where we're thinking about the applicants or complainants, who are predominantly women, being unreasonable. For what reason we're not sure, because they might be able, at the end of a two-year litigation process, to get more money, and no other factor in their life is taken into account. We're moving into these stereotypes of women being unreasonable and irrational and not making good decisions for themselves, on the basis that they might be able to get a little bit more money. When? Down the track. When we say 'down the track', we're talking six months, sometimes, just to get the first directions hearing in the Federal Court. Really, if you're moving through to a hearing, we're telling our clients, 'You're in this for about a year and a half to two years.' There is no reasonable, sensible person who would turn down a reasonable offer in order to enter into that litigation.

Those factors are, from our perspective, the reasons why this bill should pass in its current form.

**Ms Gollidge:** If I could just add to that: Commissioner Jenkins, in the *Respect@Work* report, was really clear that we just ask too much of complainants. We've all touched on the point that the complainant is the enforcer in the system and the burden on complainants is too high. Evidence was given earlier that really people litigating their rights threaten their financial security and risk bankruptcy. That's a realistic prospect. We're advising our clients: 'Yes, you have a strong claim. It depends on X, Y and Z evidence. But legal costs aren't small. Legal costs are in the hundreds of thousands of dollars.'

So the question becomes: what rational person in their right mind would pursue a case? Nobody, even if they have a very strong case—or only a very select few. That's what we see. The matters in the Federal Court are litigated by atypical high-income earners. Yet we know sexual harassment is happening to young people and people who experience other types of discrimination, have a long working life ahead of them and are struggling to buy a house—those types of things.

So we need to think about how the system does us a favour and how complainants work in the public interest to level the playing field, because more litigation increases standards across the board. Why did we make all these Sex Discrimination Act amendments in 2022 and 2023 if we can't actually get people to enforce them? We want the jurisdiction to be enlivened. I firmly believe, from working with applicants for many years, people will not run to court. People want to vomit at the thought of going to court. That's the normal human reaction and exactly the evidence. It takes years. Litigation is horrible; it's stressful, and ordinary people don't want to do that. We really value the Human Rights Commission's trauma informed expertise and processes. But taking a matter of sexual harassment and discrimination to court, which is a human right, shouldn't bankrupt ordinary Australians.

**Senator WATERS:** Beautifully said—thank you. I just have the same question to Equality Australia. How will this bill, in particular, level that fair playing field that the previous witness has just highlighted, whereby it's only a certain type of litigant that can actually even have the semblance of access to justice? How will this bill assist to allow people who have been historically disadvantaged to actually have their rights at work?

**Mr Kassisieh:** I think it will have an incredibly important indication of certainty for them. At least they will know what their legal costs will be in most cases because what they pay out of their pocket is what they're up for. They won't have this risk looming over their head that, whatever the other side—some very sophisticated, lawyered-up client—decides to pay out of their pocket, they might be up for that as well. I want to also point to two things. The issue of appeals hasn't been raised, but appeals can be brought by either the respondent or the applicant. One way of thwarting a complaint from coming is the spectre that the more powerful lawyered-up side would go all the way up the chain in an effort to kind of suppress the complaint or to take a point. At the moment the complainant there is potentially also up for costs for an action that they actually had no control over, and it might be as a result of a judicial decision that they had very little say in as well. So they're bearing that cost.

The other thing I would say is that we've been part of a conciliation at the Human Rights Commission recently in respect of the census, and we found it an incredibly useful and productive forum. We didn't want to go to court. We wanted to resolve it, and, when the two parties were incentivised to come together and have a conversation at that level, we were actually able to resolve that matter and get to a creative resolution that no court would have been able to do for us. The difference is, though, when we sat in that room we knew that if we wanted to go to the next step we would literally have to crowdfund. And we're a not-for-profit that had the benefit of pro bono assistance. We'd have to crowdfund for our own matter that was on behalf of our community, and that is not even an option for most individuals.

I've sat opposite people, and I completely agree with everything that's just been said. The last thing they want is to go to court. They have been traumatised, they've been demeaned and they've felt that their identity has been questioned. These are teachers who've been fired from schools because they're gay, and trans kids—we're talking year 7 age—have been refused enrolment at a school. These are not people that are rushing to court. Most of the time they're barely thinking about what the next job that they can get might be and whether, if they do take action, it will be taken against them so they will be victimised for standing up. And they don't know how other people have been treated. When one person goes forward, they go forward for 100 people who will never have that courage, that ability or those resources.

We've got to encourage those people to come forward because they set the standard for everyone else so that the next teacher doesn't lose their job, as their employer will look to the court precedent and see this is what it means when they treat an employee poorly, treat a student poorly or refuse a service to someone because of who they are or whom they love. They're important people that set the standards for others. Unfortunately they bear the burden right now, but I've seen so many people with strong cases who've just been terrified by the prospect of taking it further, and this just gives them that certainty that they won't lose their house or go bankrupt as well as potentially lose a case after they've been demeaned or had their dignity impacted—and all the things that come with that.

**Senator WATERS:** Thanks for your beautiful articulation of why we need these reforms and for the work you do. Thank you, Chair.

**CHAIR:** I am conscious of time. We're due to go to a break. Maybe I'll just ask one question and then we can do that. It's very hard to put it all into one piece, but I think the key thing I'd like to ask is about how this bill will make workplaces safer. I guess it comes down to cases actually going to court. There have been some suggestions, I think, or an inference from some submitters that applicants should essentially be discouraged from going through the court. I'm guessing you disagree with that. I'm wondering why it's important that we do get some cases on the public record and build that jurisprudence. It seems to me we're quite protective of our court system. They're not sensitive beings that can't cope with a few more cases. Why is it actually important we have this procedure in addition to the Human Rights Commission process?

**Ms Kendall:** I think what we need is for the courts to see the full spectrum of people that are being discriminated against and harassed. Presently what we've got is only quite wealthy people who tend to be in quite high-up professional jobs being able to and having the capacity to move through the courts through to a hearing. Therefore, we have a set of jurisprudence which only really talks about a particular set of workers or persons in Australia. It doesn't reflect the people who are widely being harassed because of their age, race or cultural background or because they are low paid or on a visa. And so I think increasing the amount of jurisprudence we have across the line and including people across the spectrum is really important. The only way that we can do

that is if we remove that financial barrier to people who don't have enough money to litigate, and that's a huge proportion of Australians. So I think that in the first instance.

But also, in the second instance, we need that jurisprudence in order to bring on early resolution. We need cases that talk about what happened, that make orders and that set out the parameters of what is acceptable and not acceptable in workplaces, from the Working Women's Centre's perspective, and then we need to be able to use those cases to then have a reasonable early resolution at the dispute resolution process. What often happens for us is that we go to a conciliation conference and we try to draw connections between the cases which have been handed down and our clients. Our clients look very different, and their harassment and discrimination look very different to maybe the senior lawyer or the senior corporate woman who has gone through the judicial process. That is certainly not to take away from her win or how hard that process is, but it doesn't reflect the clients that we are representing. They are the people that are mostly represented in the *Respect@Work* report and the latest *Time for respect* report.

**CHAIR:** The contrast to that is that, if you're representing a respondent and you're giving advice on what is a reasonable offer, if you have that jurisprudence to point to you can say, 'This is something you should consider settling because there is this jurisprudence that says the court will recognise this sexual harassment.'

**Ms Kendall:** Absolutely. You have a very real exposure to having to explain whether you've taken reasonable steps to prevent the sexual harassment, whereas at the moment there's very little space for employers having to actually explain whether they've taken those reasonable steps.

**Ms Gollidge:** I would agree that increased decisions help us educate the community and help us go into workplaces. We do a lot of work in schools to talk to people about what discrimination is—'Here's what the court's saying. This kind of conduct's not lawful.' We actually haven't had that clear judicial reasoning in all those cases that Ms Kendall's talked about.

The other thing about it is that I think it will improve the quality and nature of settlements at the Australian Human Rights Commission. We spend a lot of time with applicants in that jurisdiction. What happens is that matters settle but they settle under the fear of pursuing costs. So they settle for not-good non-financial outcomes and low financial outcomes. If we can improve the quality of settlements at the Human Rights Commission, that will have flow-on effects to workplaces. We're settling them and saying: 'You need to improve your workplace education. Your policies and procedures aren't up to scratch.' What happens now is respondents don't engage and we have a cat-and-mouse situation of: 'Is this applicant going to take it further? Probably not, because they're relying on the community legal centre. They're going to get spooked about costs.' So I think it will improve the quality of that at every level, which is absolutely what we need.

**CHAIR:** Great.

**Ms Kendall:** Can I just make an additional point there?

**CHAIR:** Sure.

**Ms Kendall:** In terms of how this will create cultural change, we really think that small-to-medium enterprises are going to take this into account when they project out financial risk. When any business thinks about financial risk, it thinks about ways to mitigate it. If you're an employer and a small, medium or large business, you're going to be thinking about how to mitigate that risk. One of the things you might do is take steps to prevent sexual harassment in the first place. So we think that the increased risk of costs, as well as employers having to bear their own costs, in conjunction with the positive obligation will actually cause some cultural change amongst small, medium and large businesses.

**CHAIR:** That's why Kate Jenkins recommended it. We're going to leave it there. Thank you very much.

**SOUTHON, Mr Michael, Executive Director, Freedom for Faith**

**SPENCER, Mr Mark, Member, Board of Reference, Freedom for Faith**

**STEAD, Bishop Michael, Chair, Freedom for Faith [by video link]**

**STEENHOF, Mr John, Managing Director, Human Rights Law Alliance**

[15:25]

**CHAIR:** I now welcome representatives from the Australian Human Rights Law Alliance and Freedom for Faith. Thank you for taking the time to speak with the committee today. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. We've been running a little bit late, so we're asking that if you do have an opening statement you keep it very brief or provide it in written form, which I think you've done.

**Mr Southon:** You have our opening statement.

**CHAIR:** Do you want to make a very brief opening statement? We've got what you've provided.

**Mr Southon:** Just to elaborate, our issue really is the difference in power differential in the sorts of discrimination cases that religious institutions face which have nothing to do with sexual discrimination or sexual harassment. We'll elaborate, I think, throughout the questions on that.

**Mr Steenhof:** I'll keep my intro very short. We are a not-for-profit law firm that helps people who face hostility and discrimination because of their faith or for freedom of speech and expression. We run these cases from both sides, both for applicants and complainants and for respondents. We do recognise that there are access-to-justice issues, but this is not an effective instrument for dealing with those. It is a very blunt instrument and should not proceed, in our view.

**CHAIR:** Thank you. We'll go to questions. Deputy Chair?

**Senator SCARR:** Thank you for attending today and thank you for the submission you've made. It's been quite helpful. As I understand it, a basic premise of your submission is that it may well be that there needs to be reform with respect to the cost provisions in the context of sexual harassment cases, but your concern is that that could be a blunt instrument when it's applied in the context of freedom of religion or religious discrimination cases. So you're particularly concerned about that province of discrimination law.

**Mr Southon:** Correct.

**Senator SCARR:** I'll ask you to respond to this question in relation to that. On the one hand, there will be those who say, 'Well, isn't it going to be a benefit to have the same cost regime across all of the discrimination legislation, rather than having different cost regimes in different provinces of the regime?' How would you respond to that?

**Mr Southon:** I would say, to start with, there is a very marked difference in the power differential. I've been here from the start listening to SDA and trade unions talking about the experience that their members have of being sexually harassed, being an employee, that whole power differential—the people who would vomit at the idea of going through a court case. In some examples of religious discrimination cases, they have been activists or individuals with a grudge, who are self-funded, who are out to hurt and out to make a point, rather than people who have been specifically discriminated against by an institution. We've got examples of people who have trawled through the internet looking for ways to be offended. That's the sort of power differential; it's a different power differential.

**Senator SCARR:** So what you're saying, if I can put it this way, is that the lived experience in religious discrimination cases is somewhat different from the sexual harassment sphere. Is that the point you're making?

**Mr Southon:** Yes.

**Senator SCARR:** Okay. Now, having said that, Mr Southon, whilst I accept the proposition that there's perhaps a greater incidence of activists, there would still be cases of people genuinely aggrieved as individuals who wish to bring claims under the religious discrimination cases. And they could be people of faith or no faith who also might be vulnerable. How do you respond to that concern?

**Mr Southon:** Can I defer to Mr Steenhof, who runs these cases?

**Senator SCARR:** Sure.

**Mr Steenhof:** This is what we call a hospital pass, Senator Scarr!

**Senator SCARR:** 'Dr' Steenhof!

**Mr Steenhof:** You're too kind. There are a number of concerns with this bill. One of them is the problem of the fact that it's going to apply across any action that is filtered through the Australian Human Rights Commission and under our Commonwealth discrimination laws, which includes not just sexual harassment but any discrimination claim and even any vilification claim or racial vilification claim.

**Senator SCARR:** So 18C.

**Mr Steenhof:** An 18C—yes. For instance, the two young fellows who were kicked out of the QUT computer lab—and then the AHRC solicited action against them under the Racial Discrimination Act about five or six years ago—would be the subject of this same disproportionate costs regime that's being proposed in this bill, in the same way that a very powerful employer and a very vulnerable woman who's experienced sexual harassment would be. In the one case it's clear that there's a very big power differential, and in the other case it's not and it's going to result in unfairness.

Another aspect of it is that the test for determining the differential between two parties is not well suited to all parties who are the subject of these discrimination claims. An example might be a Christian school, for instance. If a Christian school is pursued with an unmeritorious claim of discrimination or harassment, it needs to satisfy three tests under this bill. Firstly, it needs to satisfy the test that the applicant started proceedings vexatiously and without reasonable cause. Now that is a very, very high bar to accept. You can have cases that are lacking in merit, and which courts say are lacking in merit, yet which meet that bar. So you can have an unmeritorious case, and, if it's brought and it's unsuccessful, the school will not be able to get its costs in relation to having to defend that claim.

Secondly, there's this idea of a significant power advantage or of financial and other resources being available. Now, for a for-profit corporation, it's going to be an entity that has a large balance sheet, large budgets and money to spend on these things, but, for your average Christian school, which may have a yearly budget of \$10 million, it's very clearly got more financial resources. It's very clearly got more power than, say, an applicant for a job, and yet it's not in a great financial position or even a power position when it defends a claim of discrimination, because the ultimate people who will pay if there are large claims against them and large costs incurred are going to be the everyday Australian parents who fund the school. If you look at the way that those schools operate, they are not making profits and they don't have a pool that they can draw on to pay the exceptional costs of these matters. We run these matters, we know how much they cost and we know that there are other ways that access-to-justice concerns are met for both sides of the equation in these claims, and this is not a good way, in this bill, to deal with those concerns.

**Senator SCARR:** Okay. Do any of the other witnesses want to contribute to that?

**Mr Spencer:** My full-time job is with Christian schools, so I have firsthand experience of their situation, and they have significant resources, significant government funding, but that is used for education. Any money that's diverted to litigation is fundamentally money that's taken away from the education of children. If we are talking as though it's half a million dollars for a Supreme Court matter and a million for a High Court matter, that is money that will come directly out of providing education for the students of that school. Whether it's paid by an insurance company initially and then recovered through premiums, it's going to be paid out of those education funds. There's the notion of that power imbalance, but those provisions simply don't apply well in our context.

Can I also just comment briefly—if we're talking about sexual harassment claims, I don't think there is any concern about looking at the costs in a more nuanced way. It really is these other claims that have a far broader area of potential litigation.

**Senator SCARR:** Okay. Can I ask you, Mr Spencer, just about the insurance point. I think it's been raised in the context of sexual harassment claims that an organisation or business can get insurance to cover potential liability and their legal costs associated with defending a claim, whereas an applicant is at a disadvantage in the usual circumstance, in that respect. What do you say in response to that argument around insurance?

**Mr Spencer:** Again—excluding for a moment the sexual harassment or any cover which is more difficult, problematic and conditional—the general insurance cover for a school, for example, would be available but, again, limited by the insurance company and their desire to minimise their costs. They may move through these matters in a way that may not seek justice for anyone but comes to a settled outcome that really is not in our best interests, not in the applicant's best interests and not in society's best interests. Insurance is problematic in the first place.

There's the cost of insurance. We've spoken to insurance providers to schools and raised this bill with them, and their informal comments back were that they would simply push up premiums. Prospectively, if the bill were passed without any actual matters afoot, simply in their anticipation they'd do their risk calculation. It increases

the risk and increases the costs, and, again, that's money that's not going into providing education, whether there is a good claim or not.

**Senator SCARR:** Mr Steenhof, do you have any comment in relation to that insurance aspect? When you incur fees defending claims of this nature, to what extent are they met by insurance companies, and to what extent would this bill have a negative impact on the ability to procure affordable insurance?

**Mr Steenhof:** I don't have any direct experience in my current role, but I have no doubt that, if the current balance as to costs is displaced in favour of this asymmetrical proposal, you're going to see a big difference in the amounts that are offered for settlement early on to avoid litigation, where a party is going to pay its own costs. That always has flow-on effects for the purposes of insurance.

**Senator SCARR:** A number of case examples are provided in the submissions. Why is this threshold of 'vexatious litigant', in the sort of situations you've been speaking to, not good enough to shield a defendant against the 'activist'—in inverted commas—who is just bringing actions again and again and again in order to progress their agenda, whatever it may be? I should say that, in some cases, that can well be justified in terms of that person bringing claims. It's nuanced.

**Mr Steenhof:** Yes. It is nuanced, and the problem with access-to-justice questions is that they are polycentric. There are a number of ways that you can address the problems and distortions that you see in the system. Cost is just one of those ways. The vexatious litigant threshold is very, very high, and there are claimants who have taken many, many cases. Courts have justifiably been loath to dismiss those claims at first instance and to not allow the matter to be heard in court. The vexatious litigant standard is very good for trying to get rid of obviously vexatious claims at an early instance in the proceedings, but it's not a useful test for whether one is to recover their costs or not. That's because you can have a claim that is not merited—is lacking in merit—but is not vexatious. It has some chance, and yet a litigant is motivated to take that claim, because they know they're fully insulated from bearing the brunt of the costs.

**Senator SCARR:** Okay. I'll go through the other potential shields—or, if I could put it this way, the provisions of the bill which would enable, say, a religious institution or faith-based school who's been the subject of an unsuccessful action to seek their costs against the applicant in that situation. A vexatious litigant is one of them. The second is: the applicant's unreasonable act or omission caused the other party to incur the costs. Why isn't that sufficient to provide comfort?

**Mr Steenhof:** Because unreasonability is quite a high standard to satisfy and to prove when asking the court for costs. It's a cumulative question as well: when you're looking for your costs you have to establish that there is not a significant power advantage.

**Senator SCARR:** That's the third element or test. The first one is vexatious, the second one is when a unreasonable act or omission caused the other party to incur the cost—I think the explanatory memorandum talks about it being an intentionally high bar. There has been discussion around settlement offers, and whether or not the rejection of a settlement offer would constitute an unreasonable action. The third one is this cumulative test, where the respondent was successful on all grounds, does not have a significant power or advantage, and does not have significant financial or other resources. How does that cumulative test play out in the context of a religious or faith-based institution?

**Mr Steenhof:** It's well suited to a commercial organisation—a large corporation. It's not well suited to a not-for-profit organisation, a charitable organisation or other entities that are able to be pursued under discrimination laws. It's just a blunt instrument. For a school that has, say, a yearly budget of \$10 million, on the face of it that school is in a far better financial position than the claimant and is never going to get their costs back, even if they're successful in all. But if you delve behind to see where that money comes from and what it pays for, in a not-for-profit it's used for the education of children, and every dollar you have to pay to a lawyer to defend against an unreasonable claim is a dollar taken away from the education of children.

**Senator SCARR:** Ultimately, it would be fair to say that the cost would flow through to the parents who are choosing to send their child to a faith-based school; is that correct?

**Mr Steenhof:** Correct.

**Senator SCARR:** You might have some initial thoughts on this question, which I'm keen to hear, but feel free to take it on notice. The Law Council of Australia has proposed what they refer to as a 'broad discretion approach'. I understand we're battling with a number of definitions of umbrella descriptors of different cost approaches. I'd be pleased if you could take on notice whether or not, if the approach taken was a broad discretion approach, as proposed by the Law Council, that would provide some comfort for faith-based institutions.

**Mr Steenhof:** I haven't seen the proposal from the Law Council. I do note, though, that the status quo position gives discretion to a court, whereas this proposal here will straightjacket a court. Courts are very good in their discretion at awarding costs in the interests of justice. Oftentimes, these issues of lack of access to justice are solved in many different ways when it comes to costs. In many of the matters that we run, there are parties that are represented pro bono by members of the profession. In claims that we've run, we've often had barristers who have given generously of their time and saved our client \$150,000 in fees. Also, on the sides of those who would make claims of discrimination, there are government-funded legal organisations in Queensland and Victoria who are funded to help take these applications. To the extent that we have come up against claims these parties have brought against clients of ours, most of their representation has been done pro bono by members of the bar. So, in those kinds of claims, it's a completely different scenario to that for a sexual harassment claim, and justifies differential treatment—not a blunt instrument like this proposal here.

**Senator SCARR:** I think the distinction between the current system and what the Law Council of Australia is proposing is that instead of it being a general discretion the court is given a steer with respect to certain things it must take into account. Ultimately it can take into account other relevant matters that it considers in the interests of justice, and it's ultimately up to the court, but it's given a steer. Do you have any immediate reaction to that being helpful or not? One of the matters could well be whether or not the organisation has a charitable objective or not. I don't know.

**Mr Steenhof:** My blink response is that sounds like a much more reasonable and nuanced proposal than this proposal here. It would, of course, come down to what the detail of that proposal is.

**Mr Spencer:** Also, its application and whether it's just for sexual harassment claims or we're talking about, again, a broad scope.

**Senator SCARR:** Yes, I know, but there are a few options. Ideally, from your perspective—as I understand your submission and opening statement—you'd like to exclude this area of religious discrimination from this costs regime overall.

**Mr Southon:** Could I reverse that and say that I would like to see this restricted to solving the problem it's trying to solve, which is sexual harassment. Instead of saying, 'Here's a little carve out for religion,' I think what we're saying is there's a big problem with sexual harassment. I've been listening to the conversation and I've heard stats, particularly from the chair, about up to 80-something per cent of women suffering sexual harassment, the rates of case failure and the rates of cases that are won and still incur an award against them. This is a big problem that, arguably, could need a big stick to fix. I'm not going to comment on whether this is the right balance for sexual harassment, but once you step out of sexual harassment, the problem is different.

I submit it just needs a different approach to the solution entirely. And if this conversation were limited to sexual harassment, we would just be walking away at this point.

**Senator SCARR:** Mr Southon, you've opened a door for Mr Spencer to reflect on, and that is you run Christian schools—faith based schools—and they're large organisations. There'd be complaints of sexual harassment in the context of those organisations. It begs the question—which you can take on notice—wearing that hat, your views with respect to what's proposed with respect to sexual harassment cases.

**Mr Spencer:** Indeed. If we were just talking sexual harassment cases, I wouldn't be here. Those arguments have been well ventilated through the *Respect@Work* report. We've done research amongst our schools and the rate of sexual harassment at our schools is far lower than the general population, which we're very pleased about, though any case is one too many, so we're not getting too excited or relaxed about that. But if we were just talking about a cost regime in relation to sexual harassment matters, I don't think Christian schools would have a concern around that.

**CHAIR:** Jumping into the *Respect@Work* report then, I'm guessing you've read that report. That report looked at both sexual harassment and discrimination in workplaces. The report found that the current risk of adverse cost orders is deterring applicants from seeking to resolve complaints through the courts, whether they've been sexually harassed or discriminated against at work. Sexual harassment was the key driver of the report, but the recommendations were a little wider about discrimination at work. Do you agree there is a deterrence in the current cost regime for people seeking justice when they've been discriminated against at work?

**Mr Southon:** I'm not answering your question, but just making the point that the current bill goes even far broader than discrimination at work or sexual harassment at work, to anything that goes in front of the AHRC. Again, limiting this conversation to within the workplace would be changing the conversation for faith based institutions, who do face claims from people who are completely external to the institution or completely external to the community. That is the real fear that we're looking at—these other types of claims, which are not even

covered under *Respect@Work*. Having made that point, I will let Mark make a comment about the workplace, which isn't my field.

**Mr Spencer:** It has been a while since I looked at the report, I have to confess, but I think the primary focus, particularly around this area of the recommendations, was on sexual harassment, more than sex discrimination. I'm happy to take that on notice and come back to you with a fuller response. As I said, if we were just talking about sexual harassment it'd be a very different conversation. I think our concern is far more around the broader discrimination claims than any concerns around sexual harassment.

**CHAIR:** To be very clear, are you referring to discrimination by organisations for services or employment? What type of characterisations are you talking about?

**Mr Spencer:** Any discrimination claims that are outside those—the Sex Discrimination Act has a very clear pathway around sexual harassment.

**CHAIR:** Yes.

**Mr Spencer:** Other claims, under the Sex Discrimination Act or other Commonwealth discrimination law, that would be subject to these costs regimes are where our concerns lie, not those through the sexual harassment channel.

**CHAIR:** Is that because you think the current costs system is deterring people from making claims?

**Mr Spencer:** It's for a couple of reasons. The broader issues haven't really been well ventilated, we don't think. This bill has gone far beyond what the *Respect@Work* report interrogated, and there was lots of consultation around that. We think that the application of this regime to the broader category of claims hasn't been through the same sort of public scrutiny, notwithstanding the work of this committee. It hasn't been through that independent report process, so there hasn't been an opportunity for a full ventilation of those issues. And it just has a far greater potential for unmeritorious applications.

**Mr Steenhof:** If I can also add to that—there are absolutely concerns about ensuring access to justice and not deterring genuine claims that go forward. Many of the claims that are brought in the discrimination sphere are heard at first instance, at least at a state level, in a no-costs jurisdiction, so we see what happens when there is a no-costs jurisdiction for those kinds of claims. And we often see the other side, where ordinary everyday Australians are pursued by those who target them for a discrimination claim for something that they've said—say, on the internet or in their social media—and immediately they are talking about a settlement and conciliation. We have clients who have settled in conciliation a claim that was defensible, because they want to avoid subsequently being dragged through a tribunal. If they were then also—

**CHAIR:** But you're talking about state based laws, as well—not just a state based costs system but state based laws, which protect against different characterisations than the Federal Court system.

**Mr Steenhof:** There's a substantial overlap, but you're right: I'm talking about state based. The comparison is apt because it's a no-costs jurisdiction, often, and when you remove the ability of a respondent to recover their costs you effectively put all applicants in a no-costs jurisdiction. Not only are you going to be encouraging genuine claims to go forward; you're going to have some unintended consequences—it is also going to make unmeritorious, worthless claims more appealing. There are people who make those claims, and we've been involved in those claims.

**CHAIR:** I think what you've articulated there is the balance: there's always a balance required of providing people with an avenue to access justice and balancing where there might be vexatious claims. You've referred to examples, or the possibility of unmeritorious claims. Do you have any statistics about what proportion you're seeing through the states?

**Mr Steenhof:** It's difficult for us to give statistics or proportions, given that we act in a very narrow frame of religious freedom and freedom of speech, thought, expression and association. So it's difficult to extrapolate, because most of the claims that we have don't actually even get to a commission or to a formal legal hearing.

**CHAIR:** And why is that?

**Mr Steenhof:** Oftentimes these are settled early on or we're able to resolve them in other ways or, in many of the claims where people have a religious discrimination claim, there simply isn't adequate protection at law for them to advance their claims.

**CHAIR:** You made a comment about certain applicants being provided with pro bono representation.

**Mr Steenhof:** Yes.

**CHAIR:** That happens on the other side of the counter too, though, doesn't it? Sometimes your organisations or people who are defending claims of discrimination receive pro bono support.

**Mr Steenhof:** Correct. There's pro bono work that's done on both sides of the equation.

**CHAIR:** Thank you. We might leave it there. I am conscious of time but very grateful to you for coming in and giving evidence today. You don't have any other questions, Deputy Chair?

**Senator SCARR:** No. Thank you very much.

**CHAIR:** Thank you very much for your evidence.

**IRA, Ms Lisa, Senior Policy Officer, People with Disability Australia [by video link]**

**LAW, Ms Courtney, Senior Solicitor, Strategic Litigation, Grata Fund [by video link]**

**REINECKE, Ms Isabelle, Executive Director, Grata Fund [by video link]**

**SKIPSEY, Mr Mitchell, Senior Solicitor, Public Interest Advocacy Centre [by video link]**

**TILBURY, Ms Ellen, Principal Solicitor, Public Interest Advocacy Centre [by video link]**

**YATES, Ms Joanne, Senior Policy Manager, New South Wales, People with Disability Australia [by video link]**

[15:56]

**CHAIR:** Thank you for taking the time to speak with the committee today. Information on parliamentary privilege and the protection of witnesses and evidence has been provided and is available from the secretariat. Thank you very much for appearing today. We have opening statements from both of your organisations that have been tabled. I'm not sure if you've been following along with the hearing today, but we have been asking if it's okay if we just go straight to questions, given we're a little bit behind in time, so we're going to do that today. I'll hand the call to the deputy chair.

**Ms Reinecke:** Just to clarify, there are three organisations present at the moment.

**CHAIR:** Understood. Thank you very much.

**Ms Tilbury:** I might just add that we have prepared opening remarks from the Public Interest Advocacy Centre, and we can provide those after this hearing.

**CHAIR:** We'd appreciate that. Thank you.

**Senator SCARR:** I will go to the witnesses from People with Disability Australia first. We have tangentially touched upon issues relating to people with disability bringing discrimination claims, but I wonder if our witnesses could give us some background on the sorts of claims which are being brought in that context and the issues with respect to costs.

**Ms Yates:** We're not a legal firm, so we don't necessarily bring matters of discrimination. We do have individual advocates in our organisation who will support people in their pursuit of making claims. So we're coming to these issues in a public policy framework, and from our point of view it's just important to point out that people with disability do suffer discrimination at higher rates than people without a disability. They tend to be underemployed, if employed at all, and they tend to suffer from high rates of poverty. As a consequence of that, when they do suffer discrimination, sexual harassment or other forms of harassment in the workplace or otherwise, their ability to bring cases is undermined because of their disability. We think that the bill, therefore, provides, at least at one level, open access to justice for those people with disability who seek to engage in court matters. We think this is a really important advance, and we support it in its intent. Lisa, is there anything further you'd like to add to that question?

**Ms Ira:** I would just add to emphasise the insurmountable barrier that the current cost arrangements constitute. Just looking at it from a person with disability's perspective, when they're deciding whether to litigate in the court, at the moment it is uncertain whether they might be liable for the other party's costs. A lot of these people can't afford their own legal costs, and the possibility of having to pay, in many cases, a corporation's solicitor and barrister fees completely terminates any prospects of pursuing the claim, which means that the discrimination legislation can't actually do its job in many cases.

**Senator SCARR:** Thank you. I note from your opening statement, Ms Yates, that there were other issues, not just costs, that were relevant in this regard. You list a number of them: the need for increased funding for community legal services, improved funding for independent advocacy services, providing applicants with disability with a trained support person and/or decision-making support, ensuring complaint bodies and courts are physically accessible and communicate in accessible ways, and training for all judicial officers in disability rights. Would you like to touch upon the need for this committee, and indeed the whole of government, to consider those additional matters as part of an overall package?

**Ms Yates:** We acknowledge that going to court is a really stressful and really difficult process. Even for people who decide to enter into litigation, going to court is an incredibly stressful and incredibly trauma inducing experience for most people. We think that the support systems that might wrap around a person's attendance at court might also be considered in parallel with this really important amendment to not only deal with costs but also deal with other issues that might create barriers to people with disability in their access to court in the first

place—those measures we've outlined, and as you've just read out, in our opening statement—so people can have a support person with them to understand the court process, to understand what's going on and to interpret for them while they're in attendance at a court hearing.

The individual advocacy, as I've mentioned previously, is something our organisation does for a variety of matters for people with disability seeking services and support. It's a very important part of their ability to enter very complex and bureaucratic systems of support to understand what is before them. To the first point of funding community legal centres: for people who don't have resources or sound financial needs or who are economically insecure, community legal centres are a very affordable way for them to access justice. But oftentimes those community legal centres, as we've heard earlier today from previous witnesses, are often themselves unable to bring matters to court, because they're simply not funded to do it. That undermines the merit of cases brought by people with disability and in fact undermines the processes and the open justice that discrimination law is meant to provide citizens generally.

**Senator SCARR:** Thank you very much. My next questions are to Grata Fund and PIAC. Grata Fund, I was going through your opening statement. You make a reference: 'Australia is out of step with the world on providing adverse cost protection for cases in the public interest.' Can you expand upon the concept of public interest and how that's addressed. You say we're out of step, so that implies that other systems in overseas jurisdictions have other ways in which they treat these issues. I'm wondering whether you could expand upon that.

**Ms Reinecke:** Sure. Grata Fund is a pretty unusual organisation both in Australia and globally. I discovered this during a Churchill Fellowship in 2017, where I travelled around the world and met with litigators globally, whose mouths dropped to the floor when I explained to them the adverse cost system and how it operates for public interest matters in Australia. Colleagues in Germany, for example, could not possibly believe that you actually would have to indemnify, potentially, a plaintiff to bring an action that would be simply to enforce constitutional law or the law that we're all supposed to trust and live by. That's generally the case in jurisdictions around the world, including even the UK, who have made some efforts to reform the exposure for public interest litigants in court cases to adverse costs, including limiting the ultimate quantum that could be still applicable. We think the best example—and I will hand over to my colleague Courtney to take you through it—is an example in South Africa where the law was changed in this exact way that you're considering today and didn't actually lead to the scary possibilities that have been canvassed here today. Courtney, I will hand over to you to explain South Africa's system.

**Ms Law:** To Isabelle's point: as she mentioned, South Africa has adopted a model that's quite similar to the equal access model that's being contemplated in this bill specifically in constitutional matters in that jurisdiction. It's important to note that in South Africa their constitution is much more rights based than the constitution that we have in Australia. In having this cost model apply in constitutional matters, it also really speaks to a lot of rights based litigation that is brought in that jurisdiction. Back in 2009, the Constitutional Court of South Africa basically introduced this new cost model through its development of case law in a case called *Biowatch Trust v Registrar Genetic Resources and Others*. In that case, the court established and affirmed this principle that an unsuccessful litigant in constitutional litigation ought not be ordered to pay costs generally unless the claim that was brought was frivolous, vexatious or where there was conduct on the part of one of the parties that deserves censure. In the case where the respondent was unsuccessful in these types of public interest constitutional matters, that respondent should be required to pay the successful applicant's costs. As you can see, there are quite a few synergies between that model and the one that's being contemplated in this bill.

The court in South Africa noted that the rationale for this rule really speaks to diminishing the chilling effect that adverse cost orders have on parties with meritorious claims who are seeking to assert basic human and constitutional rights. It also recognises the inherent public interest in litigation of this kind, since a successful outcome will affect the rights of many others who are in similar situations. That speaks to this broader principle that is part of the reason that we support an equal access model in the bill, in the sense that there really is a public interest that serves when matters of public importance reach the courts, and the courts are able to perform this democratic role that they have in protecting and upholding the rights of those experiencing discrimination and harassment. What we've seen, unfortunately, with the status quo for many years is that the court's potential in Australia to perform this important role isn't fully realised, because the very people who need the court's protection can't access those courts, because of the risk of an adverse cost order.

**Senator SCARR:** Can I get our witnesses from PIAC an opportunity to contribute on this point?

**Ms Tilbury:** I think we would echo the comments made by Grata Fund. Drawing on your earlier question to People with Disability Australia as well, we do act for people with disabilities bringing discrimination claims as well as a range of other discrimination claims. We do that because a client comes to us where discrimination has

really impacted their ability to live their everyday lives. For example, they might have been unable to access transport because the train doesn't provide audio announcements or the airline doesn't accommodate their specialised wheelchair. Those are claims where, as Grata Fund talked about, people are seeking to uphold their rights to participate in everyday society. We find that we have to advise clients that there is this significant cost risk if they take the matter further than the Human Rights Commission. More often than not, those clients are unable to take on that kind of risk. Even the smallest risk is something that they can't do, because they're faced with bankruptcy or losing their homes.

**Senator SCARR:** Could I ask each of Grata Fund and PIAC to take something on notice? I want to give you an opportunity to respond to paragraphs 87 and 88 of the Law Council of Australia's submission, which provides some commentary from their perspective with respect to differences between the equal access model proposed under this bill compared with other jurisdictions. I found the South African discussion very helpful, but they also refer to a number of jurisdictions. So, if I could give you some homework, I would appreciate the opportunity for that.

I just have one final question. I should say I have a very high regard for the Australian Human Rights Commission and have found them, in my time on this committee, to be fiercely independent, very compassionate and very thoughtful with respect to these matters. I should say that the representatives are at the back of the hearing room as I make that comment. I want to give you an opportunity to respond to one of their submissions in terms of their views with respect to this legislation. I quote paragraph 16:

With the removal of incentives to resolve complaints through settlement offers and for meaningful engagement in the Commission's complaints and conciliation process, the proposed model may lead to an increase in the number of matters proceeding to court and to final determination at trial.

In the lead-up to that paragraph in their submission, the Australian Human Rights Commission refers to the proposition as to whether or not, if a complainant doesn't accept a settlement offer, that's relevant in terms of the cost decision of the court. It also refers to the issue as to whether or not a complainant participates in conciliation and whether or not that should be considered as part of any cost determination. It's based on that discussion that they lead to the commentary provided in paragraph 16. I'd like first the Grata Fund and then PIAC to respond to that submission from the Australian Human Rights Commission.

**Ms Reinecke:** I absolutely echo your assessment of the Australian Human Rights Commission, who we think are an incredible organisation and independent body who really do assert Australian human rights and discrimination rights. However, we sort of disagree on this point. I understand, on the face of it, why it would look in theory like it could lead to fewer conciliated outcomes. However, we actually think it would probably lead to more and better conciliated outcomes, because you are adjusting what is currently an unequal status quo to provide a fairer negotiating balance. What that means is you're probably actually going to see an increase in conciliated outcomes because people aren't going to feel the need that they actually have to proceed to court, because they're feeling that they're getting fair and reasonable offers in the conciliation process, because there is that extra pressure then on the respondents to actually offer decent conciliated outcomes. So we empathise greatly with the point of view but actually think that, in practice, it might do the opposite. It's actually for that reason that we agree with, or at least don't oppose, the idea that this should be something that's reviewed in a few years. We're all kind of guessing at the future at the moment, and all we can do is look at the evidence now and review it in a few years, I think. But over to PIAC.

**Mr Skipsey:** Just to pick up on that, I think we fully agree. At the moment, we practise in this space. Respondents know about the chilling effects that adverse costs orders can have there, so you often do get respondents who say, 'I'm not going to even show up at conciliation,' or 'I don't need to make serious offers.' We think that removing that chilling effect of these adverse cost orders means there's more incentive, as Isabelle says, to engage. We see that in practice. We believe that's the likely dynamic.

Again, with respect to the Human Rights Commission, we differ on this point. I guess there is one thing we want to tease out there. If you're an applicant going through the commission process, there are going to be cost ramifications for how you engage with the commission's process and whether or not you attend conciliation. Perhaps you're in two minds about whether to go there because it might be a traumatic experience for you. You might be concerned at other sorts of responsibilities. You might not fully understand that process very well. If you're unrepresented in that circumstance but you know that your decisions you make about settlement offers at that stage, at the commission stage, may well have impacts on your legal rights down the track, on the cost consequences if and when you go to court, you may well feel: 'Well, I need to get a lawyer before I engage with this conciliation at all. I need to get legal representation to engage at the commission stage.' That's not really what we hope for in the commission. We actually hope that that's an accessible stage where, if you are self-represented,

you're still able to have a constructive conversation. So we think putting the shadow of cost consequences over that part of the process is not actually a productive step for opening up access to justice here.

**Ms Yates:** Just to chip in, we would endorse absolutely those two views of our colleagues on the panel. We think it's actually going to be the reverse, with due respect, to what the Human Rights Commission might consider the 'may' in that statement. We also think, usefully, as with all good pieces of legislation, that a review mechanism is worthwhile pursuing.

**CHAIR:** I'm actually going to leave it there because you've covered all of the questions that I was going to ask, particularly around the issue of deterring applicants from going to court. Thank you very much for giving evidence today and for your submissions. We look forward to receiving that opening statement from the Public Interest Advocacy Centre.

**Ms Reinecke:** If you'll allow 30 seconds to provide a piece of information that hasn't been raised today that I think you'll find useful—

**CHAIR:** Sure.

**Senator SCARR:** Can I ask a question? Is there anything that hasn't been raised today that you think should be commented upon for our deliberations?

**Ms Reinecke:** Yes, I do. It's just to this point about the filter system that exists in our existing legal system for any judicial intervention and any litigation and about the additional layers that you'll understand exist within the discrimination system, which I won't lay out in detail here other than to note that there is a filtration system, an additional system, that was put in place in 2017, where applicants need to seek leave to be heard by the court. Almost all, except a couple, of the cases that were not given leave to be heard by the court were brought by self-represented litigants. I raise that because I think that what we need to be careful about is not using the wrong solution for the wrong problem. If we want to reduce rates of vexatious litigation—we found about three cases determined in the last three years as vexatious—the best way, probably, to deal with that and with cases going forward that aren't ultimately granted leave is to better resource services like the Australian Attorney-General's Department's National Self-Representation Service, which actually has a mandate to support self-represented litigants in discrimination matters, and to provide those self-represented litigants with better supports so that they do not come through the system unnecessarily and actually proceed with a better chance of success.

**CHAIR:** Thank you very much for raising that important issue.

**CODY, Dr Anna, Sex Discrimination Commissioner, Australian Human Rights Commission**

**CROUCHER, Emeritus Professor Rosalind, President, Australian Human Rights Commission**

**DE ABREU, Ms Melissa, Senior Lawyer, Australian Human Rights Commission**

**GARTMANN, Ms Petra, Assistant Secretary, Human Rights Branch, Attorney-General's Department**

**SHEEHAN, Ms Anne, First Assistant Secretary, International Law and Human Rights Division, Attorney-General's Department**

**STEPHENS, Ms Claire, Acting Director, Sex and Gender Section, Attorney-General's Department**

[16:18]

**CHAIR:** I now welcome representatives from the Australian Human Rights Commission and the Attorney-General's Department. Thanks for taking the time to speak with the committee today, for your submissions and for all of your engagement with the inquiry. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. I remind senators and witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Thank you all very much for being here today. Professor, I understand you have a brief opening statement to make.

**Prof. Croucher:** We have tabled a more formal opening statement. However, given this is my last chance to speak on the wider issues of discrimination law reform before a parliamentary committee, I want to provide a few minutes of context.

The costs issue this bill addresses is a symptom of a much wider access-to-justice problem. We need to have that perspective in it, because the costs piece is a piece of a much bigger puzzle. The discrimination law reform work that the commission advocated at the end of 2021 speaks to the whole of the puzzle of which the costs piece is a very small component. The broader access-to-justice issues are about the burden that sits on applicants, and that can be addressed through a holistic approach to discrimination law reform—including the positive duty, which we now see in place in the Sex Discrimination Act and a raft of other associated reforms.

In looking at the access-to-justice issues and the costs piece of the puzzle, it's important to see the fact that the answer is not necessarily just about getting more Federal Court jurisprudence, which is a theme that has dominated a whole range of submissions. The issue in access-to-justice terms is also about the level of access to justice that was removed post the Brandy decision. For nearly 25 years the intermediate tribunal functioning that is analogous to the state and territory tribunals was removed from the Human Rights Commission, and the focus was then pushed squarely into the Federal Court. The access-to-justice issue is not just about costs in the Federal Court; it is about the removal of that very important intermediate, adjudicative layer post Brandy, which was covered fully in our discrimination law reform paper. I just want to place that piece of the puzzle in that much wider context because we can get caught up in the myopic focus on which model of costs—a very important issue because it's a key element in access-to-justice issues, but the puzzle pieces are much more complex than just costs.

Having said that, I will go very briefly to the costs point. The burden on applicants has been well testified to in the many submissions that have brought the perspective of applicants very squarely before the committee. You are very familiar with the commission's recommendations on the costs issue. The recommendations from those who've had experience in the community legal centre sector—indeed, as Dr Cody has herself—can speak from a particular perspective. The perspective conveyed in the commission's submission is very much the perspective of those who've run the conciliation function of the commission for a very long time, particularly in the context of that shift in pushing it all onto access to the Federal Court or nothing at the current point.

This is not the place to speak about that full set of recs. Our submission is on the table, and I'm very keen to resolve whatever concerns you may have by way of questions. Whatever addresses the burden on the applicants by some change in the costs model is an outcome that I know very many of us would like to see as the outcome of whatever the legislation ends up being. I'll leave it at that point.

**Ms Sheehan:** We've tabled an opening statement. It is very short, so I'm happy to read it. But if you would like, in the interests of time, for us to proceed—

**CHAIR:** Can we just get it on the record, please? That would help for context.

**Ms Sheehan:** Yes, certainly. First of all, thank you very much to the committee for inviting the department to appear today for its inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill. As you know, the bill would insert a costs protection provision into the Human Rights Commission Act to implement the policy objective of recommendation 25 of the *Respect@Work* report.

The national inquiry that informed the *Respect@Work* report heard that the current costs regime in the Federal Court operates as a significant disincentive to applicants pursuing sexual harassment matters under the Sex Discrimination Act, and that disincentive is also relevant to applicants across federal unlawful discrimination law. The risk of being ordered to pay the costs of other parties to the proceedings, or having to bear your own costs if successful, can deter victims-survivors from commencing legal proceedings. This certainly creates access-to-justice concerns, particularly for vulnerable members of the community. The *Respect@Work* report considered that costs reform was required to overcome this deterrent effect and to provide greater certainty to parties as to how costs would be awarded. As the committee is aware, a costs protection provision was included in the 2022 *Respect@Work* bill but subsequently removed, with the department undertaking further consultation last year on potential models.

The model the government has included in the bill currently being considered by the committee is what, as you know, is referred to as a modified equal access model. In short, the proposed model would prevent a court from ordering an applicant to pay the respondent's costs except in certain circumstances. The equal access model recognises the beneficial intent of antidiscrimination legislation and the public interest associated with having discrimination laws enforced to protect those discriminated against. An equal access model would also address power imbalances and resource disparities that can occur in discrimination proceedings. However, the equal access model has been modified to reduce that burden on respondents who are successful on all grounds but not well-resourced or at a significant power advantage relative to the applicant. The equal access model seeks to address the barrier to seeking justice that the current regime presents while balancing the interests of applicants and respondents. We are very happy to answer your questions.

**CHAIR:** Thank you very much.

**Senator SCARR:** Can I go to the Attorney-General's Department first. I'm going to track through the explanatory memorandum and ask you some questions, if you've got that handy; I'm sure you do! I'll go to paragraph 6 first:

A respondent in federal unlawful discrimination proceedings will be liable for the applicant's costs where the applicant is successful in the proceedings on one or more grounds.

Then, if you turn to paragraph 16:

A 'respondent who was successful in the proceedings' in paragraph 46PSA(6)(c) is intended to mean that the respondent has had all claims against them dismissed. That is, the applicant has not been successful against the respondent on any ground.

I'm trying to work out what 'claim' means. That seems to be equated to 'ground' in this context. Is it a particular paragraph in a pleading? What does this reference to 'claim' or 'ground' mean in practice?

**Ms Sheehan:** My colleagues might want to add more detail. I suspect we've used it interchangeably in that a proceeding might raise a number of issues, either a number of instances of discrimination or discrimination that involves both on the basis of sex and on the basis of race—so there might be different claims being made. There also might be different claims in respect of either discrimination or harassment, so there might be a number of claims that—

**Senator SCARR:** Sorry to interrupt, Ms Sheehan, I've got limited time. What I'm trying to drill down to, because you introduced 'issues' as another term there—so we've got 'claims', 'grounds' and 'issues'—is that issues can arise in the course of a trial. They could be legal issues and they could be factual issues. Is this intended to refer to the pleading itself, where you say, 'I was discriminated against because of paragraph A, B and C'? Is that what we're talking about in this context?

**Ms Sheehan:** That's correct. Ms Stephens, did you want to add more detail?

**Ms Stephens:** Yes. I believe that is our intention that the heads of claim or the pleaded claims, and, as Ms Sheehan outlined, that could be a number of different claims within the one act or across multiple acts.

**Senator SCARR:** Going to paragraph 9, and I quote again for the record:

This means the cost provision would apply to all unlawful discrimination matters that proceed to court—not just sexual harassment matters, and not just matters relevant to the Sex Discrimination Act.

Is it the intention that this bill applies to, for example, claims brought under Section 18C of the Racial Discrimination Act?

**Ms Sheehan:** Yes, it would apply to all complaints that have been terminated by the Human Rights Commission process if they've been through that process first, so under all the federal anti-discrimination laws.

**Senator SCARR:** Thank you. Going to paragraph 13, and the last two sentences. In the context of an 'applicant's unreasonable act or omission caused the applicant to incur costs' there are two sentences at the end of that paragraph. For the benefit of Hansard it says:

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

I want to drill down regarding one phrase there, which is 'a mere refusal of a settlement offer'. What does adding the word 'mere' as an adjective to that phrase provide? It seems to be drawing a distinction between a mere refusal of a settlement offer and some other refusal of a settlement offer. I'm trying to work out what distinction you're trying to get to in the explanatory memorandum.

**Ms Sheehan:** The use of the word 'mere' is intended to indicate that there's some discretion for the court to consider the circumstances around the refusal. So the explanatory memorandum indicates that the very fact that an offer's been made and been rejected is not a sufficiently high bar for an applicant to be considered unreasonable.

We put that pointer in because—I know you've heard today and we've heard through our consultation—settlement offers have been used as a tactic to put pressure on an applicant. Given the potential impact on costs, an applicant runs the risk of an adverse costs order if they proceed to litigation. Even if they win and the damages they receive are less than the amount of the offer, it can have an impact on costs. It's meant to give a pointer that that mere refusal isn't, of itself, unreasonable but gives some discretion for the courts. Also relevant here, and it was included in our submission, is a section of the existing AHRC Act, subsection 46PKA(2) essentially provides that things that are said in conciliation remain admissible in the consideration of costs. That would provide the ability for courts to be considering what occurs in conciliation in their decision around awarding costs.

**Senator SCARR:** Okay. I'm trying to clarify for practical purposes, because there are potentially going to be small businesses, large businesses and applicants in this position where they're looking at these words, 'mere refusal of a settlement offer'. Are you intending through those words to draw a distinction between, for example, where a settlement offer of \$100,000 is made, and the ultimate decision of the court is that \$90,000 should be awarded in damages—so the delta between the offer and the ultimate award is quite minor—and situation where, say, a settlement offer of \$100,000 is made and the ultimate award is \$5,000, where there's a greater difference? Is that an example of the why you're using the word 'mere'?

**Ms Sheehan:** I wouldn't want to get into the hypotheticals of whether an offer was for \$100,000 and damages were \$5,000 or \$90,000, but—

**Senator SCARR:** Well, there will be businesses and individuals who are in this jurisdiction who will face real-life decisions in this context, so I think it is reasonable for those individuals and businesses—and, indeed, for the Australian Human Rights Commission—to be given some sort of guide as to what you mean in practice and as to the meaning or significance of 'mere refusal'. Is the quantum of the settlement offer rejected one of the factors you would expect a court to take into account, for example?

**Ms Gartmann:** It's not about the quantum that's either been offered or may be awarded at the end of the day. Firstly, we wouldn't want to be prescriptive about what the court should consider, but, having said that, the use of the word 'mere' is merely—with apologies—intended to reflect that the refusal itself isn't evidence of unreasonableness. In and of itself, to refuse a settlement offer may not be unreasonable in the circumstances, which is what the sentence is intended to mean when it's followed on with, 'This is quite a high threshold.' Refusing alone is not sufficient evidence to establish unreasonableness, although, depending on the refusal it might be.

**Senator SCARR:** Okay. Could I take you to paragraph 18. This paragraph has been the subject of some discussion during the course of today because of this term, 'significant power advantage'. One of the issues we've been discussing today—or which I've certainly been raising in questions—is to what extent the bill draws a distinction between, say, a multibillion-dollar corporation who's a respondent with an internal legal department, et cetera, and a cafe owner with four employees. I note, for the benefit of the *Hansard* record, this quote:

Under subparagraph 46PSA(6)(c)(ii), the court must consider whether the respondent has a significant power advantage over the applicant. For example, the respondent may have a significant power advantage where the respondent is an individual applicant's employer.

There's nothing to me, when I read that, that's basically a signal to say, 'a small business'. If you're an employer of someone who's brought a claim, then the intention of the bill is that that relationship in itself constitutes a significant power advantage—and it may well do so. But there's nothing in that paragraph that paragraph that draws a distinction between, say, a large corporation and your cafe owner who's just hanging on by their fingernails. Can you explain to me—is that the intention? If I'm the employer, it seems I'm not going to be able to enliven those protections because of the way the bill operates. I will always be taken, under this bill, to have a significant power advantage. Is that the intent?

**Ms Gartmann:** I think, in many circumstances where you have an employer and an employee, that is how the bill will play out, but not in all employment relationships. It might depend to some extent on the authority and power of the individual employee. They may be someone of significant standing or have significant personal resources of their own.

**Senator SCARR:** So that's the multimillionaire who's working as a barista?

**Ms Gartmann:** Yes.

**Senator SCARR:** Sorry, I was being a bit cheeky! Can I ask some questions of the Australian Human Rights Commission, please. I want to quote and welcome Dr Cody. I also note that you had experience and background working in the community legal centre field, including from an organisation that's made submissions in this case. Paragraph 10 states:

The proposed regime also differs from the models recommended in the *Respect@Work* report, which recommended a model where each party bears their own costs, and the Commission's 'Free and Equal: A reform agenda for federal discrimination law—Position Paper' (Free and Equal position paper), which recommended a model where each party bears their own costs with discretion for the court to award costs in the interests of justice having regard to prescribed mandatory criteria.

So it is the position of the Australian Human Rights Commission that what is being proposed in this bill is different from what was proposed in both the *Respect@Work* report and what was also proposed in the *Free & equal* report. Is that correct?

**Prof. Croucher:** Yes, Senator, that is correct. It is a different model. The outcome focus of it is similar—as in the impact on applicants—but in terms of the detail of the model, yes, it is different. The model that was advocated in the *Free & equal* paper was not advocated in a vacuum. It was a model that was drawn from the Family Law Act, as well as from the human rights amendment bill in 2012. It's also analogous to the state models and was one advocated for by the Productivity Commission, so it's a model that has a certain track record, but it is a different model from that that is recommended in this bill. It was the model that was included in the first iteration of the conversation about the amendments flowing from *Respect@Work* in relation to costs, but it is a different model. So, in answer to your question, yes.

**Senator SCARR:** Dr Cody?

**Dr Cody:** If I could, I will add that one of the other recommendations that came out of the *Respect@Work* report was about the need to do research into the level of costs and the disincentive that that could provide to applicants. That research was completed by Margaret Thornton and others, and that has also influenced, then, the position of the commission, having seen the impact of litigation and the reduced level of litigation, and also the reduced amounts of damages that are provided through litigation. That has, then, also influenced the commission's position.

**Senator SCARR:** Thank you. Professor Croucher, I might put this question to you because you've been holding your position in the Human Rights Commission with great honour, I must say, for a number of years. You might have been here when I put to one of our earlier witnesses the Human Rights Commission's concerns of unintended consequences, including with respect to having a negative impact on whether or not matters settle. That witness said, 'Well, that's a theoretical argument,' so I want to give you an opportunity to perhaps give us some evidence as to the practical aspect of that and how the practical experience of the Human Rights Commission informed the position which it put in its submission with respect to alternative dispute resolution.

**Prof. Croucher:** The recommendation that we made in the submission to this committee is drawn from the experience of our investigation and conciliation service, which conducts all of the alternative dispute resolution under the four pieces of the antidiscrimination laws at the federal level. So it was based on their advice—their strong recommendation—for the recommendation to you, this committee, in relation to this bill to be shaped in the way it was.

Now, insofar as things might be theoretical, indeed that is possible. The research, the experiences are based on the existing model. I think there's a commonality of agreement that whatever model is adopted would need to be reviewed. Let's get some evidence of whatever model plays out, because that informs whatever policy change in

this area might then be a further iteration of the costs issues. So, in terms of the evidence that was drawn upon for the recommendation that the Human Rights Commission put to this committee, it was the evidence of the experience of our conciliation team. Ms De Abreu, did you want to add anything to that?

**Ms De Abreu:** Obviously, as President Croucher said, one of the concerns of that team is the potential unintended consequences. The commission performs an important function. The people who conduct these conciliations are experts. It's trauma informed, and they are confidential conciliations. At the moment the current model, as we've heard from other witnesses today, doesn't incentivise respondents to necessarily engage in that process, but that doesn't mean that we shouldn't incentivise all parties to do so. We'd also add that both of those considerations, with respect to settlement offers and with respect to engagement in the conciliation process, were parts of the two models that the commission recommended in the *Free and equal* report and also in the *Respect@Work* report.

**Senator SCARR:** President—and Dr Cody might have some views on this—paragraph 17 of the Human Rights Commission's submission is with respect to the grounds of termination of a complaint. I'm not intimately familiar with how all that works in practice, so I really wanted to take some time to allow you to draw out how that step might become far more significant if the proposed bill is passed in its current form. For the *Hansard* record, I note it says:

In addition, under this model, the Commission's grounds of termination of a complaint may operate as the final barrier to a respondent's costs exposure and the amendments may have the unintended consequence of significantly increasing the administrative burden on the Commission in having to consider and respond to detailed and lengthy submissions from respondents and their legal representatives advocating for termination of a complaint on grounds which would require the complainant to seek the leave of the court before being able to proceed with an application to the court.

It seems to me that the submission is that that step is likely to gain some further significance and be more time consuming in the event that this bill is passed in its current form. I'm wondering if you could just walk us through a practical example of how that would work and why the Human Rights Commission has the concern that that may be an unintended consequence.

**Prof. Croucher:** I'll make a couple of observations and then, with respect, call upon Ms De Abreu to comment. This speaks to some of the amendments in 2017 which clarified that the leave of the court would be needed in certain contexts, but that there are other grounds where leave is not required and, therefore, a person who seeks to bring the proceedings in the court does not need to seek leave. They have a direct route, as it were, without that threshold. The administrative burden, as articulated in that paragraph and as conveyed to us, is that the attention then goes on whether or not the termination is on the basis of a leave-seeking ground. The focus then is whether the person can go straight to the court or needs to seek leave. That threshold of winnowing and the arguments about whether the termination notice addresses that issue is where the administrative burden lies. Ms De Abreu, could you add to that, please.

**Ms De Abreu:** Absolutely. That context is what has informed this part of our submission. The—

**Senator SCARR:** Sorry to interrupt. Could you give me a practical example, or even take it on notice, so I can follow the timeline of what we're talking about and where you think the pinch point will potentially be? Is that possible?

**Ms De Abreu:** We can take on notice providing a practical example, but I think the crux of it is, essentially, that there are only two grounds on which a party can commence proceedings in court without seeking leave first. That is, first, where the issue involves a matter of public importance that should be considered by the courts and, second, where there's no reasonable prospect of the matter being settled by conciliation. The administrative burden has come in where respondents—at the moment, under the current model—are already advocating to the commission for the grounds to be terminated in a way that would require the applicant to seek the leave of the court and not on the two grounds that I've just read out. We raise this because one of the concerns that was raised was that, under the proposed model, respondents may view that point in time as their last barrier towards a potentially large cost exposure and having to bear their own costs in the Federal Court. That's why we say there's a potential risk that the administrative burden may increase; we may have more of those sorts of submissions being made at that point.

**Senator SCARR:** Dr Cody, do you have anything to add?

**Dr Cody:** No, I think that's clarifying the issue. It's the abuse of the process, effectively, by respondents and that oppressive use, which we've heard a little bit about previously, about whether or not settlement offers can be used by respondents as well. This is another way in which the process can be used to prevent applicants then going on to the Federal Court.

**Senator SCARR:** This is my last question, and I'll also ask a question on notice. I'd be interested to know your views on paragraphs 93 to 105 of the Law Council of Australia's submission with respect to a broad discretion approach. Please advise the committee on notice how that would fit in with the recommendation in the *Respect@Work* and the *Free and equal* reports.

My last question for today, Professor, is this. I put forward the proposition—and, for the *Hansard* record, I'll be fair; I got decided pushback from senior counsel representing the Law Council—that one of the things that might happen if this bill were adopted, which I understand would be a different costs approach from the state based jurisdictions, is that potential complainants might seek to bring their complaints to the Australian Human Rights Commission and then go through the Federal Court, as opposed to going to a state based tribunal. The answer I got was—and I'll try and give justice to the answer—'No, it's going to be a multifaceted decision as to whether or not someone goes down the federal jurisdiction path or the state jurisdiction path.' I'm interested in your views with respect to that issue.

**Dr Cody:** I would agree with the answer that the Law Council provided in that it is a multifaceted decision. Each state and territory piece of legislation is very distinct in how it frames the grounds for proving unlawful discrimination. The decision about whether or not a complainant goes through the state mechanism or the other, as was discussed in that previous session around fair work and other options, is a multifaceted decision. Certainly, in my experience, complainants are very keen to use the federal jurisdiction and the Human Rights Commission because of the high level of skill and the trauma informed approach that we adopt at the commission. They would often prefer to use that jurisdiction but, as we know, there is that disincentive in terms of the costs risk.

**Senator SCARR:** Ms Gartmann, do you have anything you wanted to add? No. Thank you, Dr Cody.

**CHAIR:** Thank you very much. I might just start with the department. We truncated the questions we were asking witnesses earlier, and I was going to ask them a bit about their involvement in the consultation around this model. As you said in your opening statement, there was a cost model put forward in the original bill. That was taken out so there could be more consultation—a recommendation from this committee, I think. When did that consultation start? What did it involve in terms of the different types of models that could be considered?

**Ms Sheehan:** Thank you. You're right. There was a referral to the department to conduct a further consultation. The department prepared a public consultation paper that was put on our website. That was out for public consultation, from 23 February until 14 April last year, inviting submissions on that paper. The paper sought views on four potential models: the hard cost neutrality model that was originally recommended in the *Respect@Work* report; a soft cost neutrality model, which was the version that was in the bill that was presented in 2022; an equal access model; and a hybrid or applicant opt-in model.

The paper also invited stakeholders to put forward other models or combinations of models that they wished to propose to the government. We received 31 submissions in response to that, and those we've had consent to publish are now on our website. If it's helpful, I can provide on notice who provided submissions.

In addition to seeking those submissions, we also held 16 round tables with 40 stakeholders to discuss the paper and stakeholders' views, as well as meeting with stakeholders informally.

**Ms Stephens:** To clarify, we published 31 submissions on our website where we had consent; we received 35 in total.

**CHAIR:** That's a lot of round tables. Can you explain to me what the iterations of the model were? Did you narrow it down to the different types of models as you went along, or was there a clear preference from the majority of stakeholders for one over the other?

**Ms Sheehan:** Colleagues who were involved in the consultation might want to give some more detail. I wouldn't describe it as us narrowing it down over the course of the consultation; we were openly seeking views on all those models, or other models that others wished to put forward. We have done some analysis into the general support for different models arising from the submissions that we've received and published, noting that there have been other consultations over the years on these matters. If it's helpful, we can give you a sense from our assessment that about 70 per cent—that is, 24 of the 31 published submissions—supported an equal-access model. Three per cent—one out of the 31 published submissions—supported a hard-cost neutrality model. Six per cent—two of the 31 published submissions—supported a soft-cost neutrality model.

**CHAIR:** At that stage, did the Law Council of Australia have a position, or was it split and couldn't give you a definitive answer?

**Ms Sheehan:** There wasn't a consensus position at that point.

**CHAIR:** I have some questions for the Human Rights Commission. I want to clarify the discussion of your submission throughout the day. To be clear, does the Human Rights Commission welcome reform of the current cost model?

**Prof. Croucher:** Yes.

**CHAIR:** Good.

**Prof. Croucher:** I spoke to the common theme in terms of the outcome of improvements with respect to the burden that currently sits on the applicant.

**CHAIR:** I wouldn't want the concerns you've raised to be inferred as opposition to reforming the cost model.

**Prof. Croucher:** Not at all. If that were the sense that was conveyed, that is entirely antithetical to the position I was seeking to put forward.

**CHAIR:** That's helpful. Perhaps those seeking to cherry-pick things that end up in our report will do that.

**Prof. Croucher:** I was simply advocating for the wider context to be considered, all of which is about access to justice.

**CHAIR:** That is helpful. It would be a strange thing to infer given that recommendation 25 started in the Respect@Work bill, and this is the work that has been building on from that. To clarify the first recommendation in your submission about improving or amending the model that has been put forward, the commission—as I understand it—would like the bill to enable the court to have regard to some settlement offers or settlement offers; is that correct?

**Prof. Croucher:** Yes.

**CHAIR:** The current provisions of the bill provide an exception to equal-access cost models if an applicant's unreasonable act or omission causes the other party to incur costs. Do you think that an amendment to the EM or some sort of guidance would clarify that that exception could cover settlement offers and so forth?

**Prof. Croucher:** Ms De Abreu?

**Ms De Abreu:** Yes, we do. We think that, in order to operate as an incentive, the parties need to be aware that the court's going to be able to have regard to those matters. As it currently stands, by repealing the current section 46PSA, that express reference for the court to have regard to settlement offers is removed and then the only remaining reference is in the explanatory memorandum where it says that 'a mere refusal of a settlement offer' will not be considered 'an unreasonable act or omission'. For context as well, though, it probably is important for us to also say that we don't necessarily support the use of Calderbank offers or offers of compromise as they are traditionally used, where they can be used as a tool, and in an oppressive way, against an applicant. We're saying the court should retain the discretion to be able to consider settlement offers that were made and that perhaps the EM could be clear about also saying that when the court does so, it should have regard also to the circumstances of the offer and the ability of the applicant to assess its reasonableness. That might include things like whether the applicant is represented, has had legal advice, or whether there's sufficient jurisprudence for them to be able to determine what's reasonable or not. That also goes to the fact that, particularly with what we see coming out of the commission, not all settlements are financial settlements. There are a number of ways that parties can reach agreement.

**CHAIR:** I understand that. A couple of the witnesses we've had today, and through submissions, have actually made the case that these changes allowing more people to have access to the courts might actually assist the conciliation process through the Australian Human Rights Commission. Can you see how that might also be the case?

**Prof. Croucher:** I'll comment, and Dr Cody might wish to add to it. One of the issues we've identified clearly through the free and equal work was that the absence of jurisprudence is a problem because the conciliation is conducted in the shadow of the law. And when the law is limited or deficient because of, sometimes, lack of expertise et cetera there's a certain element of guessing. The absence of jurisprudence is a clear issue. It's been identified strongly, I think, in the submission by the Australian Discrimination Law Expert Group and it's something with which we would agree. Linking back to my opening comment: prior to the removal of the hearing power, that adjudicative layer, there was good jurisprudence by an expert body in terms of the hearings that the commission could conduct. That led us to propose in the discrimination law paper that there is room to reconsider that adjudicative layer, not necessarily at the commission, but the absence of that adjudicative layer led to a disappearance of the jurisprudence that was already in existence prior to the removal of that power—hence the focus on the access to justice through the courts because of the removal of that layer. The missing jurisprudence is

clearly an issue. If this generates more jurisprudence in the Federal Court, that will address that particular concern, to some extent, yes.

**CHAIR:** I have one other issue I want to go back to. I do have some questions for Dr Cody, but they're on a different matter and I'll go to you in a moment. I'm going to your direct expertise on this because I want to take us back to the respect at work bill, to begin with, and touch on something that's come through in some of the questioning today. The *Respect@Work* report referred to the 2018 national survey findings. Since then, we've had the 2022 key findings of that report in the 2022 survey. I think it's fair to say that the findings of the 2022 survey didn't show a huge shift, culturally. The publishing of the *Respect@Work* report in and of itself is not going to shift the dial on sexual harassment in our workplaces. Could you speak to the statistics in those findings and how the package of reforms around respect at work is designed to provide deterrence so that we get to a point where we're down to zero per cent one day.

**Dr Cody:** That is absolutely correct. The *Respect@Work* national inquiry did have a package of reforms, including the implementation of a council, the *Respect@Work* Council, which is still in existence, and also ensuring that there were provisions within the Fair Work Act as well as work health and safety provisions and the introduction of a positive duty, as well as the commissioning of the research, which I referred to earlier, which demonstrated the paucity of jurisprudence and also the very low amounts that were awarded in damages. All of those measures and all the recommendations have been or are in the process of being implemented. This is the last of the recommendations. Certainly we can see that there is a need for continuing action within this area because of the ongoing prevalence of sexual harassment and sex discrimination within our community and within our society. So this is the last piece. We do recognise, as the president has mentioned, that the equal access model provides one way of trying to address that overly heavy burden on applicants.

**CHAIR:** Just before we finish, could you comment on something. We're talking about workplaces and work health and safety. Sometimes there are distinctions in workplace law about how small businesses or big businesses are dealt with as employers who are respondents. I think that's why the conversation sometimes comes up. But the harm of sexual harassment is the same whether you're in a small business or a big business. Dr Cody, you might be able to speak to whether small businesses might be even more at risk for, particularly, women when it comes to sexual harassment as opposed to a big business that has a system in place to prevent it. There's a balance we need to strike here, isn't there, in making sure that people are protected at work whether they're in a small business or a big business?

**Dr Cody:** Absolutely. The ability to be safe at work and to know that you are free from sexual harassment and sex discrimination needs to apply across all workplaces. There are different measures in terms of positive duty. What's reasonable and proportionate is going to be different for a small business from what will be required for a large business. But certainly the amount of compensation that someone should receive needs to reflect the harm that they have suffered through having experienced sexual harassment or sex discrimination at work. There are some changes within the law, but certainly in the area of damages I would say that it should not reflect whether the person is from a small business or a larger business.

**CHAIR:** From the department's point of view, this is the balance you've had to weigh up in the provisions we've talked about today where small business might be captured or the power imbalance might be captured. But that discussion hasn't quite picked up the context that small businesses have different reasonable steps or that the reasonableness that is required of a small business is different to a big business, which we dealt with in the last inquiry on the last bill—that there is a different level of reasonableness or steps that they need to take or could take.

**Ms Sheehan:** With respect to the positive duty?

**CHAIR:** Yes, the positive duty is what I'm talking about here.

**Ms Sheehan:** That's certainly right with respect to the positive duty. As the Sex Discrimination Commissioner's mentioned, what might be reasonable or proportionate for a small business might look different to a large multinational.

**CHAIR:** Yes. We're going to leave it there. Thank you very much for your submissions and your work. Can I say to the department that the consultation sounds very extensive. So thank you very much for working with us on that and taking the recommendation of this committee and looking at this provision a little bit more before it gets enacted. Thank you very much.

**McKERNAN, Ms Katherine, Executive Director, National Legal Aid**

**SCHLEIGER, Ms Melanie, Special Adviser, Strategic Litigation, Equality Law Program, Victoria Legal Aid**

[17:10]

**CHAIR:** Sorry we're a little late. Thank you very much for joining us at the end of our program today. Information on parliamentary privilege and the protection of witnesses giving evidence has been provided to you and is available from the secretariat. We have been giving people the opportunity to make a short opening statement. We are a little late on time, so if you wanted to make a brief statement that would be fine, and then we'll head straight to questions. We do have your written statement; thank you for that.

**Ms Schleiger:** Good afternoon. We acknowledge the Ngannawal and Ngambri peoples as the traditional owners of the lands on which we're meeting today and pay our respects to their elders, both past and present.

National Legal Aid represents the eight state and territory legal aid commissions that are the main providers of legal assistance to people experiencing disadvantage in Australia and have extensive experience in providing legal assistance to clients who've experienced discrimination. We've played a pivotal role in establishing and coordinating the Power to Prevent Coalition, together with the ACTU, the Kingsford Legal Centre and others. That coalition brings together legal services, community organisations, unions, academics, peak bodies, health professionals, lawyers and victims-survivors that seek positive change to stop sexual harassment at work.

We welcome and strongly support the proposed changes. The bill is a significant and important amendment that will implement the final outstanding recommendation from the *Respect@Work* report and will ensure that more people who experience unlawful discrimination can access a remedy. It's supported by careful research commissioned by the government and undertaken by Emerita Professor Margaret Thornton and colleagues at the Australian National University.

People who experience discrimination and sexual harassment should be supported to come forward without the risk of becoming bankrupt or having a large debt simply for enforcing their rights. The equal access model appropriately shifts the costs of pursuing a successful discrimination claim from the individual applicant to the person or company that has contravened discrimination laws. This change is especially important for individuals in low-paid and precarious employment, which often translates to lower awards of compensation that are quickly eroded by legal costs in litigation.

However, the likely impact of this bill should not be overstated. Even if it's enacted, the vast majority of people who experience unlawful discrimination will choose not to make a legal claim, let alone litigate their case to final hearing. Litigation involves enormous personal cost and risk for complainants in discrimination cases and is often a retraumatising event that prolongs psychological recovery from the incident and can contribute to further stress and distress. For many people, there's also the significant financial risk of being left out of pocket if unsuccessful. These social, emotional and financial costs of litigation create an enormous incentive for applicants to consider reasonable offers of settlement.

Some submissions have claimed that the equal access model would disincentivise clients from settling at conciliation. However, discrimination cases are about much more than just financial compensation. They are about addressing the harm caused by discrimination. Conciliation processes for our clients are emotionally charged events where they are usually seeking acknowledgement of the harm inflicted and an apology.

Over the past 10 years, Victoria Legal Aid's specialist discrimination law service, the Equality Law Program, has provided over 12½ thousand legal advices about discrimination matters and run over a thousand case files. But, during that time, only four of our clients proceeded to hearing and final judgement, and none of those cases related to or was a sexual harassment claim; they were pregnancy and disability discrimination claims.

One of our clients who didn't proceed to hearing—I'll call her Hashini, but that is not her real name—endured serious sexual harassment at work, including multiple instances of rape by her boss. Victoria Legal Aid supported Hashini through a gruelling, multi-year litigation process, including extensive delays due to a concurrent criminal law investigation. At mediation, Hashini settled for significantly less than she could have obtained if successful at hearing. She told us that the matter had gone on for too long and she just wanted to move on with her life. I cannot recall a single client who did not willingly participate in a commission conciliation process in good faith. We do, however, regularly see respondents fail to meaningfully engage in conciliation processes, including by refusing to listen to our clients' impact statements, by having representatives with no authority to negotiate settlement terms or by offering insultingly low amounts of compensation.

Because discrimination cases are about more than money, we consider that the bill should be amended to clarify that the mere refusal of a settlement offer is not intended to amount to an unreasonable act or omission for the purpose of the exceptions. This is important in a human rights jurisdiction where the litigation goals will often include restoring dignity and respect and achieving public vindication and systemic change. The alternative approach would undermine the goals of the equal access model to create greater cost certainty for applicants, disincentivise unlawful conduct and increase understanding of discrimination law by encouraging more jurisprudence.

My hope is that this amendment will encourage more respondents to genuinely try to resolve discrimination complaints as early as possible. The rare individuals who pursue meritorious discrimination claims to hearing are performing an important public service and a critical role in our discrimination law system. Their cases clarify the law, educate the community about equality rights and responsibilities and encourage greater efforts to prevent unlawful conduct. Case law also helps lawyers to advise their clients with greater certainty and streamline future legal pleadings. These amendments create an equitable cost model that supports all individuals to enforce their right to nondiscrimination, irrespective of how much money they earn. The amendments also recognise the public interest in supporting people to speak up about discrimination and deterring unlawful conduct and are therefore critical to reducing discrimination and harassment in our community.

Thank you. We're happy to take questions.

**CHAIR:** Thank you very much. Deputy Chair.

**Senator SCARR:** Thank you for appearing and thank you for all the work you do in supporting people who need your support. It's very important work. Your paper helpfully provides at some length—pages 10 and 11—international examples of equal-access cost models. I've raised this issue with prior witnesses. I'm trying to square away your observations and that of other witnesses with the observations of the Law Council of Australia in paragraphs 87 and 88 of their submission. I won't seek to put you on the spot now unless you can offer some comments now in relation to the topic, but there is a discrepancy between the evidence that's being provided by expert witnesses with respect to whether or not the equal access model that is proposed in this bill is comparable to what applies in other jurisdictions. For the benefit of the record: paragraph 87 of the Law Council of Australia's submission says:

It should also be noted that the equal-access model would operate on a significantly wider basis than comparable models overseas.

They do talk about the US situation. I'm not sure if there's anything you'd like to add now or you would be kind enough to deal with the Law Council's position in paragraphs 87 and 88 on notice.

**Ms Schleiger:** I'd appreciate the opportunity to carefully consider what they've stated and take that question on notice.

**Senator SCARR:** Sure. Thank you. I think you make the arguments in your submission very well, so congratulations to whoever put the submission together or who helped. If someone else is listening who participated in that process: I think they did a great job. One of the things I'd like to understand on a practical basis is the extent to which someone under the current situation—say, in hospitality a young person on very low income who has been subject to an awful event of sexual harassment or discrimination—is able to access legal aid. What does that person do to access legal aid, and to what extent are they going to be successful in accessing legal aid? We can talk about costs et cetera but the person having that support and advice of a lawyer when they enter into the conciliation process of the Human Rights Commission, and they have to make the decision as to whether or not to go to the next step, is, it seems to me, going to be very important. What sort of magnitude of underrepresentation are we dealing with under the current system?

**Ms Schleiger:** At Victoria Legal Aid, where I work, that person could contact us and receive telephone advice, and we provide them with some limited advice about their legal options and potentially about the merit of their claim. For them to receive further, more intensive assistance, we would consider their financial means and eligibility and conduct an assessment of the merit of their case and whether it meets our funding guidelines effectively or our guidelines for prelitigation assistance. It will very much depend on their financial circumstances as to whether they can receive ongoing assistance.

**Senator SCARR:** Just to drill down a bit further: presumably you have a budget, and I'm sure you can provide that—and I'm sure it's very helpful—initial advice that would give people a steer and some support. But, in terms of going to the next step of considering the present financial situation, a lot of the people will be vulnerable Australians—and you've given us some case studies. To what extent are you having to knock back genuine and

bona fide well-deserving applicants because you simply do not have the resources? Or is it the case that you just do your best to make sure you help everyone you can? I'm just trying to get a feel for the degree of the issue.

**Ms Schleiger:** And you've just done significant work on this question. To answer it in simple terms: there is significantly more demand for legal assistance than what we can provide. In this area, one of the really significant problems is people aren't wanting to take their claim further. There are so many barriers that prevent that person, that young person in hospitality who's experienced awful sexual harassment, from taking any action at all. We're saying to this inquiry that the risk of an adverse costs order is one more really significant barrier. Aside from that, there are risks to the person's reputation. There's the fact that pursuing a legal claim and litigation can be inconsistent with recovery from a sexual assault and traumatic event. It requires the person to retain that as a focal point in their lives. There are many barriers to that person taking any kind of action.

**Ms McKernan:** We're very grateful to have received Respect@Work funding for a number of the legal aid commissions to provide legal assistance and support to women experiencing sexual harassment at work; we're very grateful for that additional funding. To your point around unmet need: we've recently done some work to look at the means test and accessibility, through a report called *Justice on the brink* that identifies that our means test is incredibly tight. To be eligible, you need to be well under the poverty line—so eight per cent of Australian households are eligible. Unfortunately, due to funding constraints we also have to apply guidelines to make sure we're accessing the most vulnerable people. In this space we make exceptions because it's important because of the high vulnerability of the people that come to us. Additional funding for legal assistance in this space would be very welcome, and we aren't meeting the need in any real way. Community legal centres also provide this kind of service and legal assistance as well, and they have very limited funding. They receive Respect@Work funding too, which is really welcome in terms of expanding this work. Legal assistance funding is another piece of the puzzle in terms of ensuring women are able to access the process.

**Ms Schleiger:** If I could clarify, there are different rules that apply at different legal aid commissions. At Victoria Legal Aid, there is an exception for workplace sexual harassment matters when it comes to assessing a person's financial means, but the exception does not currently apply to other types of discrimination. We have recently expanded our service, thanks to this additional funding, and inquiries are skyrocketing. We are really concerned about our ongoing capacity to meet client demand and assist people who ask for our help.

**Senator SCARR:** I am pleased we've got that on the record today.

**CHAIR:** I have a couple of questions about the balance that's being struck here around trying to stop there being a deterrence for applicants resolving issues through the courts. The Law Council of Australia doesn't support this model. Are you disappointed by their position or is that something that you'd expect?

**Ms Schleiger:** I am surprised and disappointed. We consider the model that they've proposed to be highly problematic. It's completely inconsistent with the goals of this bill, which are to increase cost certainty for applicants, create more certainty for the community by clarifying discrimination laws, and increase access to justice by supporting applicants to pursue a complaint through to final hearing. It is very surprising. I think what they have recommended would do the complete opposite.

**Ms McKernan:** We're also a little surprised about the suggestion that there will be a deluge of unmeritorious claims going through the system. As Melanie has referenced in her opening statement, the number of cases at the moment is very small across the discrimination space, particularly in sexual harassment. Even if it were to double the number of matters, it is not going to be significant number, unfortunately. We just don't have the evidence for the likelihood of that happening.

**CHAIR:** On those numbers, what proportion of clients coming to you actually go through to court?

**Ms Schleiger:** Over the past 10 years, we've provided over 12,500 legal advices about discrimination matters. We've run over a thousand cases, and just four of our clients have proceeded to hearing and final judgement—no sexual harassment cases.

**CHAIR:** None?

**Ms Schleiger:** None. It is heartbreaking.

**CHAIR:** That's why I am not a lawyer anymore, to be honest. Too many clients came in and you had to tell them that what had happened was horrible and not fair and not legal, but there was very little chance of them receiving any justice.

**Ms Schleiger:** Sorry—

**CHAIR:** I totally get it, I've been there.

**Ms Schleiger:** Even more heartbreaking is telling a person they've got a really strong case and that we will support them all the way, but they can't proceed because it is taking such a heavy toll on their mental health. Sorry, I have been doing this for a long time and I know it has an accumulative negative impact when you see that repeatedly time and again. It feels like the system is so broken.

I don't think this is going to be the complete solution, but it really will make a difference to some people and that is so important to help create societal change and prevent discrimination and sexual harassment from occurring. That's something that hasn't been discussed today. The incredible role that these cases can play in encouraging duty holders to take steps to prevent discrimination and take more steps to increase compliance. There is so much that organisations can do to minimise the risk of being sued for discrimination which create other benefits for those organisations as well. There is an incredible amount of evidence of other positive impacts of creating organisational change that promotes safety and diversity and inclusion. I think it's a very important piece of legislation.

**CHAIR:** We talked about this being the final piece of the puzzle, but the other way to say that is the implementation of the final recommendation from the *Respect@Work* report. It's a very powerful report for people who work in the field that you do. For Australian women in general, what will it mean, in terms of the conversations you have with your clients, to have that final recommendation implemented?

**Ms McKernan:** One of the points is that it's also a really big game changer for women on low incomes. Often, they experience significant harassment and discrimination in general, and they just don't have the recourse. So the other important piece of this puzzle is for women on low incomes in particular, and I wanted to note that. Mel, did you want to talk about the completion in general?

**Ms Schleiger:** Obviously, it won't do much for clients who have already been through the current legal system, but I know they will be incredibly encouraged that the situation may improve for others. I think it's a really important point that Katherine has made: for many of our clients, it completely changes the cost-benefit analysis for them on whether or not to proceed with a claim. And for many of our clients whom we are saying no to who don't meet our means test—that middle bracket of people who aren't eligible for not-for-profit legal assistance but don't have the means to pay for a private lawyer—this will be particularly significant because it means that pursuing a legal claim is actually going to be a viable option for them.

**CHAIR:** That's a good place for us to finish. Thank you very much for your evidence and thank you for the work that you do. It's hard work.

**Ms Schleiger:** Thank you.

**CHAIR:** I'm just going to seek a motion from the Deputy Chair to accept all the tabled documents, which I think were just opening statements today.

**Senator SCARR:** Sure.

**CHAIR:** That concludes today's proceeding. The committee has agreed that answers to questions on notice at this hearing should be returned by close of business Monday 5 February 2024. I thank all witnesses who have given evidence to the committee today. I also thank Broadcasting and the secretariat.

**Committee adjourned at 17:33**