

The Senate

Legal and Constitutional Affairs
Legislation Committee

Australian Human Rights Commission
Amendment (Costs Protection) Bill 2023
[Provisions]

February 2024

© Commonwealth of Australia 2024

ISBN 978-1-76093-602-0 (Printed version)

ISBN 978-1-76093-602-0 (HTML version)

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Printed by the Senate Printing Unit, Parliament House, Canberra

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Acronyms and abbreviations

ACCI	Australian Chamber of Commerce and Industry
ACL	The Australian Christian Lobby
ACTU	The Australian Council of Trade Unions
ADLEG	The Australian Discrimination Law Experts Group
AGD	Attorney-General's Department
AHRC	The Australian Human Rights Commission
AHRC Act	<i>Australian Human Rights Commission Act 1986</i>
ALA	Australian Lawyers Alliance
the bill	Australian Human Rights Commission Amendment (Costs Protection) Bill 2023
Bishops Conference	The Australian Catholic Bishops Conference
the committee	Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee
CPSU	The Community and Public Sector Union
EM	Explanatory Memorandum
FCFCOA	Federal Circuit and Family Court of Australia
FCR	<i>Federal Court Rules 2011</i>
HRLA	Human Rights Law Alliance
Law Council	The Law Council of Australia
PJCHR	The Parliamentary Joint Committee on Human Rights

Respect at Work bill	<i>Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2023</i>
the Scrutiny Committee	The Senate Standing Committee for the Scrutiny of Bills
SDA	Shops, Distributive and Allied Employees' Association
Working Women's Centre	The Australian Working Women's Centre SA Inc

List of recommendations

Recommendation 1

- 2.97 The committee recommends that the bill or the explanatory memorandum be amended to clarify what constitutes the 'unreasonable acts or omissions' of the applicant when the court considers making the applicant liable for costs.**

Recommendation 2

- 2.98 Subject to the preceding recommendation, the committee recommends that the Senate pass the bill.**

Chapter 1

Introduction

- 1.1 On 30 November 2023, the Senate referred the provisions of the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 9 February 2024.¹
- 1.2 The referral followed a recommendation of the Senate Standing Committee for the Selection of Bills.² Appendix 2 to that report suggested that an inquiry into the bill was necessary '[t]o carefully scrutinise this legislation and understand any impacts it has on employers'.³

Conduct of the inquiry

- 1.3 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant organisations and individuals inviting submissions by 9 January 2024. The committee received 35 submissions, which are listed at Appendix 1. The committee held a public hearing in Canberra on 31 January 2024. A list of witnesses is provided at Appendix 2.
- 1.4 Submissions and the *Hansard* transcript of evidence may be accessed through the committee's website. Answers to questions on notice and other material received by the committee is also available on the website.
- 1.5 The committee thanks the organisations and individuals who made written submissions and those who gave evidence at the public hearing.

Structure of the report

- 1.6 The report comprises two chapters as follows:
 - Chapter 1 outlines the administrative details of the inquiry, background to the inquiry, and the key provisions of the bill; and
 - Chapter 2 examines key issues raised by submitters and witnesses. It also sets out the committee's views and recommendations in relation to the bill.

Purpose of the bill

- 1.7 The bill would amend the *Australian Human Rights Commission Act 1986* (AHRC Act) to insert an 'equal access' costs protection provision that would apply to all unlawful discrimination proceedings commenced in the

¹ *Journals of the Senate*, No. 90, 30 November 2023, pp. 2522–2525.

² Senate Standing Committee for the Selection of Bills, *Report No. 15 of 2023*, p. 1.

³ Senate Standing Committee for the Selection of Bills, *Report No. 15 of 2023*, Appendix 2, p. 3.

Federal Circuit and Family Court of Australia (FCFCOA) and the Federal Court (collectively the federal courts). The amendment would implement recommendation 25 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report (Respect@Work report).⁴

Recommendation 25

Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).⁵

Background

The Respect@Work report

- 1.8 On 20 June 2018, the Commonwealth government announced that it would contribute funding to the Australian Human Rights Commission (AHRC) to inquire into sexual harassment in Australian workplaces.⁶
- 1.9 On 5 March 2020, the AHRC released the Respect@Work report.⁷ That report:
- ...made 55 recommendations addressed to the Government, states and territories, employers and industry groups to prevent and address sexual harassment in Australian workplaces. The recommendations related to five key areas of focus: data and research, primary prevention, workplace prevention and response, support and advocacy, and legal and regulatory reform.⁸
- 1.10 Of the 55 recommendations, 13 required legislative reform.⁹ With the passage of the following legislation, all but one of those recommendations have been implemented:
- *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*, which commenced on 11 September 2021;
 - *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*, which commenced on 13 December 2022; and

⁴ Australian Human Rights Commission (AHRC), [Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces](#) (Respect@Work report), 2020.

⁵ AHRC, [Respect@Work report](#), 2020, p. 45.

⁶ The Hon Kelly O'Dwyer MP, Minister for Women, 'National inquiry into workplace sexual harassment', *Media release*, 20 June 2018.

⁷ AHRC, *Respect@Work: Sexual Harassment National Inquiry Report (2020)*, 5 March 2020, www.humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020 (accessed 4 December 2023).

⁸ Attorney-General's Department (AGD), [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 6.

⁹ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 6.

- *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, which commenced on 7 December 2022.¹⁰

1.11 Recommendation 25 of the Respect@Work report is the only unaddressed recommendation that requires legislative reform.¹¹ The AHRC received evidence that indicated that the risk of incurring costs orders ‘operates as a disincentive to pursuing sexual harassment matters under the [Sex Discrimination Act 1984]’.¹²

1.12 To address its concerns related to that evidence, the AHRC recommended that the AHRC Act ‘be amended to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* [Fair Work Act]’.¹³ Section 570 of the Fair Work Act stipulates that an individual may only be ordered to pay costs if they ‘instituted the proceedings vexatiously or without reasonable cause; or...[their] unreasonable act or omission caused the other party to incur the costs’.¹⁴

1.13 The Attorney-General’s Department (AGD) highlighted:

While the Respect@Work Report was particularly concerned with the risk of an adverse cost order acting as a deterrent to applicants bringing complaints under the Sex Discrimination Act in the federal courts, the costs model that would be introduced to implement recommendation 25 would apply to all complaints of discrimination under Commonwealth anti-discrimination law, across all protected attributes and all areas of public life covered by those laws—not just employment-related discrimination complaints, and not just complaints made under the Sex Discrimination Act.¹⁵

Costs protection models

1.14 A costs order ‘sets out which party must pay the legal costs associated with proceedings, which is generally regulated by legislation and by court rules’.¹⁶ The federal courts generally make costs orders ‘according to the guiding

¹⁰ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 6.

¹¹ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 6.

¹² AHRC, [Respect@Work report](#), 2020, p. 507.

¹³ AHRC, [Respect@Work report](#), 2020, p. 507.

¹⁴ *Fair Work Act 2009*, ss. 570(2).

¹⁵ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, pp. 6-7.

¹⁶ Leah Ferris, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023, *Bills Digest No. 33, 2023-24*, Parliamentary Library, Canberra, 2023, p. 3.

principle that ‘costs follow the event’. Under this principle, an unsuccessful party to litigation is ordinarily ordered to pay the costs of the successful party’.¹⁷

- 1.15 The costs protection model outlined in the Respect@Work report is referred to as the ‘hard cost neutrality model’.¹⁸ After the release of that report, the AHRC ‘updated its position to recommend a ‘soft cost neutrality’ model’.¹⁹ In 2021, the AHRC suggested ‘that the default position should be that parties bear their own costs, as contained in the Human Rights and Anti-Discrimination Bill 2012, with the court retaining a discretion to award costs in the interests of justice’.²⁰
- 1.16 The ‘soft cost neutrality model’ was included in the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Respect at Work bill).²¹ Under that model, each party to a complaint would bear their own costs unless the court believed there were grounds to depart from that position.²² The Respect at Work bill included a list of matters that the court must consider when deciding whether to make a costs order.²³
- 1.17 The AHRC indicated that there are circumstances in which courts should be able to award costs:
- Frivolous or vexatious complaints, or some defence strategies, for example, impose unnecessary costs on other parties and the court system, and might need to be discouraged by the prospect of costs being awarded in such cases.²⁴
- 1.18 On 28 September 2022, the provisions of the Respect at Work bill were referred to this committee for inquiry and report.²⁵ In its report, the committee observed that there were differing views from stakeholders on the cost provisions included in proposed section 46PSA of that bill:

¹⁷ AHRC, [Free and Equal: A reform agenda for federal discrimination laws](#), 2021, p. 191. Note: the Federal Court acknowledged that ‘[t]he amounts involved can be many thousands of dollars, sometimes tens of thousands’ see, Federal Court of Australia, *Legal Costs*, www.fedcourt.gov.au/going-to-court/i-am-a-party/court-processes/legal-costs (accessed 4 December 2023).

¹⁸ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 7.

¹⁹ AGD, *Submission 24*, p. 5.

²⁰ AHRC, [Free and Equal: A reform agenda for federal discrimination laws](#), 2021, p. 191.

²¹ Schedule 5 of the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Respect at Work bill).

²² Proposed section 46PSA of the Respect at Work bill.

²³ Proposed subsection 46PSA(3) of the Respect at Work bill.

²⁴ AHRC, [Free and Equal: A reform agenda for federal discrimination laws](#), 2021, p. 196.

²⁵ *Journals of the Senate*, No. 15, 28 September 2022, pp. 376–377.

Several stakeholders supported the provision on the basis that cost neutrality would be an improvement on the current approach. However, other stakeholders argued that the proposal does not go far enough and would fail to achieve its intended objective.²⁶

- 1.19 The committee was of the view that the costs provisions ‘would provide a degree of costs certainty for both parties and allow the courts the flexibility to deal with costs on a case-by-case basis’.²⁷ The committee recommended that the Australian Law Reform Commission conduct an inquiry into the operation of the costs provisions six to 12 months after passage of the bill.²⁸
- 1.20 The government considered the committee’s recommendation and decided to amend the Respect at Work bill ‘to remove the cost protection provisions from the bill’.²⁹ In its response to the committee’s report, the government stated that it had ‘referred the issue of costs in discrimination proceedings to the Attorney-General’s Department for review’.³⁰
- 1.21 In February 2023, the AGD opened consultation on ‘determining an appropriate costs protection model for Commonwealth anti-discrimination matters that proceed to court’.³¹ That consultation was undertaken from 23 February 2023 to 14 April 2023.³²
- 1.22 The AGD reported that the consultation process made it ‘clear that stakeholders broadly agreed that reform is necessary, but there was no consensus on what model that reform should take’.³³

²⁶ Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee (the committee), *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]*, November 2022, p. 32.

²⁷ The committee, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]*, November 2022, p. 39.

²⁸ The committee, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]*, November 2022, p. 39.

²⁹ Australian Government, *Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]*, January 2023, p. 2.

³⁰ Australian Government, *Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]*, January 2023, p. 2.

³¹ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 7.

³² AGD, *Review into an appropriate cost model for Commonwealth anti-discrimination laws*, 23 February 2023, <https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/> (accessed 4 December 2023).

³³ AGD, *Submission 24*, p. 6.

1.23 The AGD reinforced the view of the AHRC that the lack of costs protection disincentivises potential applicants from pursuing judicial intervention:

The current framework of broad judicial discretion does not provide applicants and respondents in discrimination matters at the federal level with sufficient certainty as to how costs will be awarded. The risk of an adverse costs order is significant for parties and operates as a clear disincentive to pursuing litigation. In the absence of clear legislative provision to provide this certainty, neither the judiciary nor the legal profession (responsible for representing applicants) are using the existing discretion in a way that would overcome this uncertainty and disincentive. The costs risk associated with litigation therefore continues to represent a significant barrier to applicants.³⁴

1.24 The AGD noted that there are no specific provisions that guide ‘how costs are awarded in discrimination matters before a federal court’.³⁵ Currently, it is at the ‘broad discretion [of the courts] to award costs as they see fit’.³⁶

1.25 It also noted that while federal courts most commonly make no costs orders (meaning that parties bear their own costs), ‘the number of costs orders made against applicants has increased over time, and costs orders are made less frequently against respondents’.³⁷

1.26 The AGD consultation paper listed the following costs models and invited stakeholders to propose other options:

- the option originally recommended by the Respect@Work Report, which is a model based on section 570 of the Fair Work Act (‘hard cost neutrality’);
- the option put forward in the Respect at Work Bill 2022 (‘soft cost neutrality’);
- an asymmetrical cost model [‘equal access’]; and
- a hybrid or applicant opt-in model.³⁸

³⁴ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 10.

³⁵ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 9.

³⁶ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 9.

³⁷ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 10. Note: AGD quoted research from the Australian National University that found that ‘since 2001, applicants have been ordered to pay the respondent’s costs in 56% of cases where the applicant was unsuccessful and sometimes even when the applicant was successful’.

³⁸ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 22.

1.27 The Law Council of Australia (Law Council) proposed a fifth model, the broad-discretion model.³⁹

Hard cost neutrality

1.28 Under the hard cost neutrality model, ‘each party to a proceeding bears their own costs, except where either party has acted vexatiously or unreasonably’.⁴⁰ This model is based on section 570 of the Fair Work Act and:

...provides that costs may only be ordered against a party if the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause, or if the court is satisfied that a party’s unreasonable act or omission caused the other party to incur costs.⁴¹

1.29 The AGD stated:

...the threshold for what is considered ‘vexatious’ is generally quite high. This means matters can proceed to court and incur costs even where they have been terminated by the President of the [AHRC] on the grounds that they are vexatious or unmeritorious.⁴²

1.30 In its assessment of the advantages and disadvantages of the hard cost neutrality model, the AGD suggested:

- that it would provide greater costs certainty for both parties to a proceeding;
- that it ‘may encourage more public interest pro bono litigation’;
- legal representatives acting for both parties are unlikely to be able to recoup their costs, which ‘is likely to create issues for applicants (and respondents) securing legal representation’;
- that it ‘may increase the risk of unmeritorious discrimination complaints that are not vexatious, but nonetheless lack substance...proceeding to court’; and
- that it ‘may also be vulnerable to well-resourced litigants engaging in delay tactics, incurring increasing costs in order to limit the other party’s ability to continue with the proceedings’.⁴³

1.31 In its consideration of the hard cost neutrality model, the AGD concluded:

Overall, this model may continue to deter applicants (particularly those who are not well-resourced) from proceeding to court with their matter, unless

³⁹ Law Council of Australia (Law Council), *Submission 33*, p. 20.

⁴⁰ AGD, *Submission 24*, p. 6.

⁴¹ AGD, *Submission 24*, pp. 6–7.

⁴² AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 23.

⁴³ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, pp. 24–25.

they are being provided legal assistance or supported on a purely pro bono basis.⁴⁴

- 1.32 The AGD also noted that stakeholders expressed concerns ‘that the ‘hard cost neutrality’ model is not appropriate for the anti-discrimination law context’.⁴⁵

Soft cost neutrality

- 1.33 Under the soft cost neutrality model, ‘parties would bear their own costs, but the courts would retain a broader discretion to award costs in the interests of justice having regard to certain mandatory (but non-exhaustive) criteria’.⁴⁶ The AGD suggested that ‘criteria could include, for example, the financial circumstances of each of the parties to the proceedings and whether any party has been wholly unsuccessful in the proceedings’.⁴⁷

- 1.34 The AGD explained:

The role of the criteria under this cost model is to direct the court to consider a range of things that are particularly relevant to discrimination matter (such as any power imbalance between parties and the public importance of individuals being able to enforce their right to be free from discrimination), as well as broader considerations around access to justice, fairness and litigation procedure generally. Giving the courts this broad discretion, while pointing to criteria that should be central to their consideration, enables the court to balance and weigh competing interests before deciding how costs should be awarded.⁴⁸

- 1.35 The AGD submitted that the main difference between the hard cost neutrality and the soft cost neutrality models is the broader scope for the court to exercise its discretion under the soft cost neutrality model.⁴⁹

- 1.36 Some stakeholders in the AGD consultation process indicated ‘that the ‘soft cost neutrality’ model would not provide sufficient certainty for applicants due to the court’s broad discretion to award costs in the interests of justice’.⁵⁰ Stakeholders also suggested that the ‘model could impact applicants’ access to

⁴⁴ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 25.

⁴⁵ AGD, *Submission 24*, p. 5.

⁴⁶ AGD, *Submission 24*, p. 7.

⁴⁷ AGD, *Submission 24*, p. 7.

⁴⁸ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 26.

⁴⁹ AGD, *Submission 24*, p. 7.

⁵⁰ AGD, *Submission 24*, p. 6.

legal representation...which could create further barriers to justice for some victim-survivors who rely on no-win no-fee legal representation'.⁵¹

1.37 In its assessment of the advantages and disadvantages of the soft cost neutrality model, the AGD suggested:

- that there would be a level of certainty for parties to a proceeding about the costs they would be required to pay, 'but less certainty than a hard cost neutrality model';
- that it 'would have similar disadvantages in relation to the ability of parties to secure legal representation as the hard cost neutrality model';
- that it 'would pose less of a risk than the hard cost neutrality model in terms of encouraging litigation strategies designed to frustrate the ability for a party to continue with court proceedings';
- that it would provide parties to proceedings with greater scope to recover costs than the hard costs neutrality model, but 'would still present disadvantages in terms of parties' ability to secure legal representation when compared to the status quo'; and
- stakeholders have argued that the soft costs neutrality model would be unlikely to overcome the barriers that applicants face when considering launching a discrimination claim.⁵²

Equal access

1.38 The equal access model would not require an unsuccessful applicant:

...to pay the respondent's costs except in certain limited circumstances (where the applicant had acted vexatiously or unreasonably in commencing the proceedings or in the way they conducted themselves during proceedings). Where an applicant is successful, the respondent would be liable for the applicant's costs.⁵³

1.39 The AGD suggested that the equal access 'model is weighted more in favour of applicants and overcoming barriers to them proceeding to court'.⁵⁴ To that end, 'it seeks to level the playing field for applicants'.⁵⁵

⁵¹ AGD, *Submission 24*, p. 6.

⁵² AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, pp. 27–28.

⁵³ AGD, *Submission 24*, p. 7.

⁵⁴ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 28.

⁵⁵ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 28.

1.40 The AGD reported '[t]he majority of victim-survivor representative organisations, legal professionals, employee representatives, human rights advocates and academics...supported an equal access model'.⁵⁶

1.41 In its assessment of the advantages and disadvantages of the equal access model, the AGD suggested:

- that it would mitigate 'the risk of an adverse cost order almost entirely';
- there would be an increased risk of adverse costs orders for respondents;
- applicants would be in a better position to secure legal representation under an equal access model; and
- respondents would be in a weaker position to secure legal representation as they 'would not be able to recover their legal fees even if successful'.⁵⁷

1.42 The AGD concluded that the equal access:

...model may encourage more discrimination matters of public interest and value to be brought before the courts for judicial consideration, given applicants would face less financial risk and disincentive from doing so. Conversely, this model may encourage more unmeritorious complaints, given the financial risk and disincentive would shift primarily to respondents. And while this may be appropriate in some cases, where respondents are well-resourced corporate entities and at a significant power disparity over an applicant, many respondents do not fit this profile and would be at a significant disadvantage under this model.⁵⁸

Applicant choice model

1.43 The applicant choice model would present the applicant with two choices at the beginning of court proceedings as to how costs would be resolved:

The applicant could choose either a 'costs follow the event' model (whereby the unsuccessful party has costs awarded against them) or a hard cost neutrality model (where each party bears their own costs, unless a party acts unreasonably or vexatiously).⁵⁹

1.44 The AGD suggested the applicant choice model 'would empower applicants to control how costs are settled and provide them with a measure of flexibility based on their circumstances'.⁶⁰ While the parties to the proceeding are treated equally in terms of the risk of bearing costs, 'the respondent would have to

⁵⁶ AGD, *Submission 24*, p. 6.

⁵⁷ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 29.

⁵⁸ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 29.

⁵⁹ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 29.

⁶⁰ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 30.

accept the model chosen by the applicant'.⁶¹ Applicants would have 'greater choice, control and flexibility' under this model, while maintaining the same advantages and disadvantages as the status quo and hard cost neutrality model.⁶²

Modified equal access model

1.45 The costs model proposed in the bill is described as 'a modified equal access cost protection provision'.⁶³ The AGD submitted:

...the Government determined that a modified equal access model would best achieve the objectives of recommendation 25 of the Respect@Work Report, being to address the existing financial and power disparities between most applicants and respondents in unlawful discrimination proceedings, and increase access to justice.⁶⁴

1.46 The Explanatory Memorandum (EM) to the bill explains that this model is different to the one recommended by the Respect@Work report.⁶⁵ The modified equal access model adds:

...the ability to award costs against an applicant in circumstances where the respondent has been successful on all grounds, the respondent does not have a significant power advantage over the applicant and the respondent does not have significant financial or other resources, relative to the applicant.⁶⁶

1.47 According to the EM, that modification 'achieves the policy objective of recommendation 25 of the Respect@Work Report...[and] balances the interests of applicants and respondents in unlawful discrimination proceedings while not impacting applicants' access to legal representation'.⁶⁷

1.48 The Attorney-General, the Hon Mark Dreyfus KC MP, reported that the government had listened to the concerns raised by multiple stakeholders about the 'soft cost neutrality model' proposed by the AHRC.⁶⁸ The modified equal access cost protection model was adopted following 'careful consideration and

⁶¹ AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 30.

⁶² AGD, [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 30.

⁶³ The Explanatory Memorandum to the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (EM), p. 3.

⁶⁴ AGD, *Submission 24*, p. 8.

⁶⁵ EM, p. 3.

⁶⁶ EM, p. 3.

⁶⁷ EM, p. 3.

⁶⁸ The Hon Mark Dreyfus KC MP, Attorney-General and Cabinet Secretary, *House Hansard*, 15 November 2023, p. 12.

close and comprehensive consultation with a wide range of organisations and individuals'.⁶⁹ Following that consultative process, it is the view of the government that the 'bill would strengthen Australia's antidiscrimination framework and help achieve its core objective of eliminating all forms of discrimination'.⁷⁰

- 1.49 The Attorney-General suggested that the proposed amendments strike a balance between reducing barriers potential applicants face when deciding whether to launch discrimination proceedings and providing protections for small, less powerful respondents. He stated:

Significantly, this modified equal access model addresses the power imbalances and resource disparities present in most unlawful discrimination proceedings. At the same time, the modifications to the equal access model recognise that not all respondents in unlawful discrimination proceedings are well-resourced or at a power advantage over the applicant, such as some individuals or small businesses.⁷¹

Broad-discretion model

- 1.50 The Law Council argued that the modified equal access model 'does not strike an appropriate balance between the interests of applicants and respondents in discrimination cases'.⁷² It proposed an alternative, 'more moderate approach to costs reform'.⁷³

- 1.51 Under the broad-discretion model:

...the courts would retain a discretion to award costs as appropriate in the circumstances of each case. However, given the strictness of the usual rule that costs follow the event, this discretion would be guided by legislation to ensure relevant considerations are borne in mind.⁷⁴

- 1.52 The model would retain the general principle:

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

⁶⁹ The Hon Mark Dreyfus KC MP, Attorney-General and Cabinet Secretary, *House Hansard*, 15 November 2023, p. 12.

⁷⁰ The Hon Mark Dreyfus KC MP, Attorney-General and Cabinet Secretary, *House Hansard*, 15 November 2023, p. 13.

⁷¹ The Hon Mark Dreyfus KC MP, Attorney-General and Cabinet Secretary, *House Hansard*, 15 November 2023, p. 13.

⁷² Law Council, *Submission 33*, p. 20.

⁷³ Law Council, *Submission 33*, p. 20.

⁷⁴ Law Council, *Submission 33*, p. 20.

- the financial circumstances of each of the parties to the proceedings and their capacity to obtain legal representation;
- whether the proceedings were frivolous or vexatious or misconceived or otherwise had little merit;
- the conduct of the parties (including in dealings with the [AHRC]) and whether a party's conduct caused the other party to incur costs unnecessarily);
- whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings or the matter the subject of the terminated complaint and, if so, the terms of the offer;
- whether the subject matter of the proceedings involves an issue of public importance;
- whether any damages award would cover the legal costs of the applicant and/or any adverse costs order; and
- any other matters that the court considers relevant.⁷⁵

1.53 The Law Council suggested that the broad-discretion model would address the disincentives that applicants experience in deciding to pursue discrimination proceedings:

It would allow arguments to be raised as to a range of relevant factors, including the parties' resources and conduct. It would give applicants a greater measure of protection than the status quo, while being more consistent with the principle of equality before the law than equal access.⁷⁶

1.54 The Law Council suggested the broad-discretion model would achieve recommendation 25 of the Respect@Work report while also providing:

- 'an appropriate level of disincentive for unmeritorious claims';⁷⁷
- 'the courts greater guidance to award costs fairly, in recognition of the wide range of factors applicable to many discrimination cases';⁷⁸
- 'some disincentive for applicants to bring claims compared with a modified 'equal access model'';⁷⁹ and
- 'greater capacity for both applicants and respondents to have adequate access to justice and legal representation'.⁸⁰

1.55 The AHRC stated that while the broad-discretion model:

...would allow the court to make costs orders in the interests of justice having regard to mandatory relevant considerations...in the Commission's view, the 'broad-discretion' costs model does not shift the approach to costs

⁷⁵ Law Council, *Submission 33*, pp. 20–21.

⁷⁶ Law Council, *Submission 33*, p. 20.

⁷⁷ Law Council, *Submission 33*, p. 21.

⁷⁸ Law Council, *Submission 33*, p. 21.

⁷⁹ Law Council, *Submission 33*, p. 21.

⁸⁰ Law Council, *Submission 33*, p. 21.

significantly from the current regime. By retaining the default position that costs follow the event, this model does not address the well-established concerns with the existing approach to costs identified in the Commission's [Respect@Work report] and its Free and Equal position paper, including the serious disincentive of an applicant's exposure to the risk of a significant adverse costs order and the burden that applicants currently carry.⁸¹

Redress for unlawful discrimination under the AHRC Act

- 1.56 The AHRC Act allows one or more people to lodge a written complaint with the AHRC relating to allegations of unlawful discrimination.⁸² Any complaint relating to an allegation of unlawful discrimination made to the AHRC must be referred to the President of the AHRC.⁸³
- 1.57 The President of the AHRC is required to consider whether to inquire into any complaint referred to him or her.⁸⁴ During that consideration, 'the President may inform himself or herself of such facts and circumstances as are necessary to form the opinion' on whether to inquire into the complaint.⁸⁵ After considering that information, the President may 'terminate the complaint without inquiry' if he or she is of the opinion that it should be terminated.⁸⁶
- 1.58 If the respondents to the complaint are the AHRC, the President of the AHRC, or a Commissioner of the AHRC, the President may terminate the complaint if he or she receives a written request from any complainant seeking termination of the complaint.⁸⁷ The President must be 'satisfied that all the affected persons agree to the termination' before the complaint is terminated.⁸⁸
- 1.59 The President of the AHRC has the discretion to terminate a complaint on several defined grounds.⁸⁹ The President is required to terminate a complaint if he or she 'is satisfied that the complaint is trivial, vexatious, misconceived or lacking in substance; or there is no reasonable prospect of the matter being settled by conciliation'.⁹⁰ The President must also terminate a complaint if he or she 'is satisfied that there would be no reasonable prospect that the

⁸¹ AHRC, Answers to spoken questions on notice, 31 January 2024 (received 6 February 2024).

⁸² AHRC Act, s. 46P.

⁸³ AHRC Act, s. 46PD.

⁸⁴ AHRC Act, para. 46PF(1)(a).

⁸⁵ AHRC Act, ss. 46PF(1A).

⁸⁶ AHRC Act, para. 46PF(1)(b).

⁸⁷ AHRC Act, s. 46PE.

⁸⁸ AHRC Act, ss. 46PE(2).

⁸⁹ Note: Those grounds are listed in AHRC Act, ss. 46PH(1).

⁹⁰ AHRC Act, ss. 46PH(1B).

[federal courts] would be satisfied that the alleged acts, omissions or practices are unlawful discrimination'.⁹¹

- 1.60 If the President of the AHRC terminates a complaint, he or she must provide written notice of that decision to the complainant outlining the reasons for it.⁹²
- 1.61 A complainant may make an application to the federal courts alleging unlawful discrimination by any of the respondents if their complaint is terminated for any of the reasons outlined in paragraphs 1.57–1.59.⁹³ That application must be made within 60 days of the issue of the written notice described in paragraph 1.60, or within any additional time that the court allows.⁹⁴
- 1.62 If the federal courts institute proceedings as a result of such an application and a settlement offer made by the applicant or the respondent is rejected, 'the court, or a judge of the court, in deciding whether to award costs in the proceedings, may have regard to the offer'.⁹⁵
- 1.63 The existing costs provisions of the AHRC Act allow the federal courts, or a judge of those courts, to consider rejected settlement offers when deciding whether to award costs in unlawful discrimination proceedings.⁹⁶ Those provisions would be repealed by the bill.⁹⁷ The AGD pointed out 'there is nothing preventing the court's consideration of offers to settle, and under subsection 46PKA(2), things said in conciliation remain admissible in the consideration of costs'.⁹⁸

⁹¹ AHRC Act, ss. 46PH(1C).

⁹² AHRC Act, ss. 46PH(2).

⁹³ AHRC Act, ss. 46PO(1). Note: The alleged unlawful discrimination in the application is required to be the same (or substantively the same) as the alleged unlawful discrimination described in the terminated complaint or have arisen from the same (or substantively the same) 'acts, omissions or practices' as the alleged unlawful discrimination described in the terminated complaint. See: AHRC Act, ss. 46PO(3).

⁹⁴ AHRC Act, ss. 46PO(2).

⁹⁵ AHRC Act, s. 46PSA. Note: Section 43 of the *Federal Court of Australia Act 1976* and section 214 of the *Federal Circuit and Family Court of Australia Act 2021* allow the federal courts to award costs in proceedings.

⁹⁶ AHRC Act, s. 46PSA

⁹⁷ AGD, *Submission 24*, p. 10.

⁹⁸ AGD, *Submission 24*, p. 11.

Introduction of the bill

- 1.64 In introducing the bill, the Attorney-General stated that it ‘represents the final legislative reform required to fulfil the Albanese government’s commitment to implement the recommendations of the *Respect@Work* report’.⁹⁹
- 1.65 The Attorney-General highlighted the importance of the bill to ensuring that victim-survivors are not deterred from pursuing justice for unlawful discrimination. He argued:
- ...that for victim-survivors, the risk of an adverse order for costs is a significant barrier to accessing justice in federal unlawful discrimination court proceedings. Victim-survivors should not be deterred from commencing or running legal proceedings by the risk of an adverse cost order.¹⁰⁰
- 1.66 The EM explains that the bill would ‘provide greater certainty regarding costs to all parties involved in [federal unlawful discrimination court proceedings]’.¹⁰¹
- 1.67 He pointed out that ‘an adverse cost order can also magnify existing financial and power disparities between an individual applicant and certain respondents, such as large corporations or well-resourced individuals’.¹⁰²

Key provisions of the bill

- 1.68 The bill would repeal the existing costs provisions in the AHRC Act and replace them with ‘equal access’ costs protection provisions that would apply to all unlawful discrimination proceedings commenced in the federal courts.
- 1.69 The main amendment proposed by the bill would apply to proceedings before the federal courts that relate to an application made by an applicant after their initial complaint of alleged unlawful discrimination is terminated by the President of the AHRC.¹⁰³ The amendment would also apply to ‘appeals pursued in the High Court’.¹⁰⁴

⁹⁹ The Hon Mark Dreyfus KC MP, Attorney-General and Cabinet Secretary, *House Hansard*, 15 November 2023, p. 12.

¹⁰⁰ The Hon Mark Dreyfus KC MP, Attorney-General and Cabinet Secretary, *House Hansard*, 15 November 2023, p. 12.

¹⁰¹ EM, p. 3.

¹⁰² The Hon Mark Dreyfus KC MP, Attorney-General and Cabinet Secretary, *House Hansard*, 15 November 2023, p. 12.

¹⁰³ Proposed subsection 46PSA(1) of the bill.

¹⁰⁴ Proposed subsection 46PSA(1) of the bill; EM, p. 12.

- 1.70 The EM notes that ‘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 1984*]’.¹⁰⁵
- 1.71 If the court rules that ‘the applicant is successful in proceedings on one or more grounds, the court must order each respondent against whom the applicant is successful to pay the applicant’s costs’.¹⁰⁶
- 1.72 The EM maintains that this provision of the bill would grant the court ‘discretion to apportion costs as it sees fit. This may include orders allocating some or all of the costs to the applicant depending on the circumstances of the case’.¹⁰⁷
- 1.73 If the court is of the view that an ‘applicant’s unreasonable act or omission caused the applicant to incur costs, the court is not required to order the respondent to pay the costs incurred as a result of that act or omission’.¹⁰⁸
- 1.74 According to the EM, those acts or omissions could include situations ‘where the applicant has unreasonably caused unnecessary delays in proceedings, failed to comply with court orders and rules, or otherwise abused the processes of the court’.¹⁰⁹ The EM notes that ‘[t]his is intended to be a high threshold and reserved for rare cases’.¹¹⁰
- 1.75 It lists several examples of acts or omissions that are not intended to be considered unreasonable:
- 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.¹¹¹
- 1.76 The court must not order the applicant to pay the costs of any party to the proceedings, except in limited circumstances.¹¹² The court may order the applicant to pay costs if:
- (a) the court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause;
 - (b) the court is satisfied that the applicant’s unreasonable act or omission caused the other party to incur the costs; or

¹⁰⁵ EM, p. 12.

¹⁰⁶ Proposed subsection 46PSA(2) of the bill.

¹⁰⁷ EM, p. 13.

¹⁰⁸ Proposed subsection 46PSA(4) of the bill.

¹⁰⁹ EM, p. 13.

¹¹⁰ EM, p. 13.

¹¹¹ EM, p. 13.

¹¹² Proposed subsection 46PSA(5) of the bill.

(c) all of the following apply:

- (i) the other party is a respondent who was successful in the proceedings;
- (ii) the respondent does not have a significant power advantage over the applicant;
- (iii) the respondent does not have significant financial or other resources relative to the applicant.¹¹³

1.77 In relation to the term ‘power advantage’, the EM explains that it ‘is intended to be broad and include consideration of historically unequal power relations as well as social and cultural power imbalances and organisational power imbalances’.¹¹⁴ It suggests:

For example, a senior, older or longstanding employee may have a significant power advantage over a junior, younger or new employee. Other factors such as a hierarchical workplace culture or industry and the employer’s conditions of employment can also be relevant.¹¹⁵

1.78 The EM points out that consideration was given to these kinds of interpersonal relationships in the drafting of the bill ‘to reflect that the resource and power disparities between applicants and respondents in unlawful discrimination matters are not limited to financial resources, but instead can reflect structural inequalities’.¹¹⁶

1.79 In cases where a representative acts on behalf of the applicant and the court makes a costs order, that order can only be made against the representative and not the individual or individuals on whose behalf the application is made.¹¹⁷ The EM notes that upon making a representative application, ‘the representative body is accepting the risks associated with pursuing discrimination complaints in court’.¹¹⁸ It explains that this provision ‘may also encourage public interest litigation in unlawful discrimination matters’.¹¹⁹

¹¹³ Proposed subsection 46PSA(6) of the bill. Note: The EM explains that ‘the respondent would need to provide evidence of their financial position. This modification to the equal access model has been made to strike the appropriate balance between alleviating barriers to accessing justice for applicants in anti-discrimination proceedings and the burden on respondents’. See: EM, p. 15.

¹¹⁴ EM, p. 15.

¹¹⁵ EM, p. 15.

¹¹⁶ EM, p. 15.

¹¹⁷ Proposed subsection 46PSA(7) of the bill.

¹¹⁸ EM, p. 15.

¹¹⁹ EM, p. 5.

Consideration by other parliamentary committees

- 1.80 When examining a bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny Committee) and the Parliamentary Joint Committee on Human Rights (PJCHR).
- 1.81 The Scrutiny Committee and the PJCHR reported that they have no comments on the bill.¹²⁰

Note on references

- 1.82 In this report, references to *Committee Hansard* are to the proof transcript. Page numbers may vary between the proof and official transcripts.

¹²⁰ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15/23*, 29 November 2023, p. 32; Parliamentary Joint Committee on Human Rights, *Report 13/2023*, 29 November 2023, p. 1.

Chapter 2

Key issues

- 2.1 This chapter outlines some key issues raised in evidence to the committee about the provisions of the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (the bill).
- 2.2 Most submitters broadly supported reforms to costs orders in federal discrimination cases.¹ Some raised concerns about particular aspects of the bill, such as the:
- bill shifting the burden of costs risk onto respondents;
 - appropriateness of the modified equal access costs model applying to all federal discrimination cases;
 - definition of unreasonable acts or omissions;
 - potential for offers of compromise to effectively recreate the conditions that the bill is seeking to remedy; and
 - possibility of the bill resulting in increased discrimination litigation.

Shifting of costs risk onto respondents

- 2.3 Some submitters raised concerns that the equal access costs model would place the risk of incurring costs more heavily on respondents.²
- 2.4 For example, the Human Rights Law Alliance (HRLA) argued the bill:
- ...encourages discrimination proceedings to be brought when they never should be, including by actions motivated by prejudice and intolerance. The

¹ See, for example: Australian Discrimination Law Experts Group (ADLEG), *Submission 1*, p. 2; Diversity Council Australia, *Submission 2*, p. 1; Migrant Justice Institute, *Submission 7*, p. 1; Grata Fund and Public Interest Advocacy Centre, *Submission 8*, p. 2; Equality Australia, *Submission 9*, p. 3; The Working Women's Centre SA Inc (Working Women's Centre), *Submission 10*, p. 2; Community and Public Sector Union (CPSU), *Submission 11*, p. 1; Australian Lawyers Alliance (ALA), *Submission 12*, p. 6; Australian Institute of Company Directors, *Submission 13*, p. 1; Mr Kieran Pender, *Submission 14*, p. 1; National Foundation for Australian Women (NFAW), *Submission 18*, p. 2; National Legal Aid, *Submission 22*, p. 1; Shop, Distributive and Allied Employees' Association (SDA), *Submission 23*, p. 2; Australian Council of Trade Unions (ACTU), *Submission 25*, p. 3; People with Disability Australia, *Submission 26*, p. 1; Kingsford Legal Centre, *Submission 27*, p. 1; Power to Prevent Coalition, *Submission 28*, p. 1; Law Society of NSW, *Submission 32*, p. 2; Aboriginal Legal Service (NSW/ACT), *Submission 35*, p. 1.

² See, for example: Australian Human Rights Commission (AHRC), *Submission 3*, p. 5; Human Rights Law Alliance (HRLA), *Submission 5*, p. 1; FamilyVoice Australia, *Submission 19*, p. 2; Mr David A W Miller, *Submission 20*, p. 1; Freedom for Faith, *Submission 21*, p. 3; Rev David Fitzgerald-Maher, *Submission 31*, p. 2; Law Council of Australia (Law Council), *Submission 33*, p. 6; Australian Chamber of Commerce and Industry (ACCI), *Submission 34*, p. 3.

Bill would introduce unacceptable inequality between those making discrimination claims and those defending them.³

2.5 It suggested that the modified equal access costs model would deprive:

...any religious entity, such as a school or church, of being awarded costs, except against an exceptionally well-heeled individual, when justice demands that costs should be payable by the party initiating the proceedings, because of their misuse of the process.⁴

2.6 The Law Council of Australia (Law Council) pointed out that it is a general legal principle that costs orders are designed 'to compensate the person in whose favour it is made without having a punitive effect'.⁵

2.7 The Australian Chamber of Commerce and Industry (ACCI) raised similar concerns that the bill would:

...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.⁶

2.8 The Australian Catholic Bishops Conference (Bishops Conference) similarly submitted that the implications of the bill do not appear to have 'been considered in any context outside of employment'.⁷ It suggested that the bill and the EM do not provide clarity on:

...how a charity, school, church, or community organisation could demonstrate that there is no significant 'power imbalance' in the context of the provision of services. This could preclude a court from issuing a costs order in accordance with the proper interests of justice.⁸

2.9 It pointed out that those respondents are not always well-resourced, and applicants may have the means to fund a claim.⁹ It submitted:

Respondents in discrimination litigation are incredibly varied and include private individuals of different means, small businesses, charities, churches, schools, and community organisations. It is an error to assume, as the Bill does, that respondents will typically be well-resourced. It is similarly

³ HRLA, *Submission 4*, p. 1.

⁴ HRLA, *Submission 5*, p. 1.

⁵ Law Council, *Submission 33*, p. 6.

⁶ Ms Jessica Tinsley, Director, Workplace Relations, General Counsel, ACCI, *Committee Hansard*, 31 January 2024, p. 9.

⁷ Australian Catholic Bishops Conference, *Submission 17*, p. 3.

⁸ Australian Catholic Bishops Conference, *Submission 17*, p. 3.

⁹ Australian Catholic Bishops Conference, *Submission 17*, p. 2.

erroneous to assume that an applicant will not have adequate funding to pursue a claim, particularly with the recommendation that representative actions be permitted.

- 2.10 The Bishops Conference argued ‘these misplaced assumptions render the Bill fatally flawed, and unfairly impose the cost of defending unmeritorious discrimination claims upon respondents’.¹⁰
- 2.11 The HRLA suggested that the bill would ‘imperil Christian schools by making them liable for the costs of any strategic discrimination lawfare that is partially successful’.¹¹ It argued that this strategy would prevent Christian schools from pursuing ‘claimants in costs for vexatious or worthless claims that are made that seek to weaponise discrimination laws’. In the HRLA’s view, the bill would ‘further erode the fundamental rights of parents to ensure the religious and moral education of their children in conformity with their own convictions’.¹²
- 2.12 The HRLA ‘recognise[d] 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’.¹³
- 2.13 The Bishops Conference recommended that the bill be withdrawn.¹⁴ It argued the bill does not implement recommendation 25 of the Respect@Work report as it:
- ...is inconsistent with section 570 [of the Fair Work Act] because it treats applicants and respondents unequally by forcing a court to make a costs order against a respondent unless the respondent is successful on every single ground before the court.¹⁵
- 2.14 It noted that there were limited circumstances in which the respondent would not be ordered to pay costs, such as if ‘the applicant instituted the proceedings vexatiously or without reasonable cause or the applicant’s unreasonable act or omission caused the other part to incur the costs’.¹⁶ The Bishops Conference pointed out that these requirements are ‘not present in section 570 [of the Fair Work Act]’.¹⁷

¹⁰ Australian Catholic Bishops Conference, *Submission 17*, p. 2.

¹¹ HRLA, *Submission 5*, p. 2.

¹² HRLA, *Submission 5*, p. 2.

¹³ Mr John Steenhof, Managing Director, HRLA, *Committee Hansard*, 31 January 2024, p. 26.

¹⁴ Australian Catholic Bishops Conference, *Submission 17*, p. 2.

¹⁵ Australian Catholic Bishops Conference, *Submission 17*, p. 2.

¹⁶ Australian Catholic Bishops Conference, *Submission 17*, p. 2.

¹⁷ Australian Catholic Bishops Conference, *Submission 17*, p. 2.

2.15 The Australian Christian Lobby (ACL) similarly pointed out that '[s]ection 570 only contemplates costs orders when proceedings are instituted vexatiously'.¹⁸ It argued that the bill is incongruent with recommendation 25 of the Respect@Work report as that report was confined to measures designed to address workplace sexual harassment.¹⁹ The ACL opined '[t]he Bill expands extravagantly on Recommendation 25' for the following reasons:

- it would apply to all federal discrimination proceedings, not just those related to sexual discrimination;
- it would apply to proceedings that involve allegations of unlawful discrimination, rather than allegations of harassment; and
- it would create legislation that does not operate in a similar manner to section 570 of the Fair Work Act and would instead create a costs model that 'is asymmetrical, disproportionate and without justification'.²⁰

2.16 The ACCI similarly remarked that the costs model proposed by the bill differs from that put forward by the Respect@Work report.²¹ It stated that its preference is for there to be no change to the status quo, 'that costs should follow the event'.²² If reform of the costs model is required, its preference is for the adoption of 'the model put forward in the *Respect@Work* report, which is recommendation 25'.²³

2.17 The Working Women's Centre SA Inc (Working Women's Centre) indicated that the Respect@Work report:

...demonstrated that vulnerable workers are increasingly more likely to experience sexual harassment in the workplace. These vulnerabilities can often create a barrier for Complainants to engage in litigation, in addition to the imbalance of power dynamics and disparity of financial recourses that exist between Complainants and Respondents. The current costs model facilitates a further financial barrier for Complainants to pursue their matters in court, as the fear of adverse costs orders being made is a large deterrent in bringing forward unlawful discrimination claims.²⁴

¹⁸ Australian Christian Lobby (ACL), *Submission 6*, p. 3.

¹⁹ ACL, *Submission 6*, p. 4.

²⁰ ACL, *Submission 6*, pp. 4–5.

²¹ Ms Tinsley, ACCI, *Committee Hansard*, 31 January 2024, p. 11.

²² Ms Tinsley, ACCI, *Committee Hansard*, 31 January 2024, p. 11.

²³ Ms Tinsley, ACCI, *Committee Hansard*, 31 January 2024, p. 11.

²⁴ Working Women's Centre, *Submission 10*, p. 2–3.

2.18 It considered that ‘to date it’s been Australian women who have been bearing the cost of pushing cultural and judicial change’.²⁵ In the opinion of the Working Women’s Centre, the bill presents:

...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.

2.19 According to Equality Australia the bill ‘includes important safeguards which balance the interests of complainants and respondents where there is no financial or power imbalance between them’.²⁶ It stated that the equal access costs model is ‘the fairest and most appropriate costs model for federal discrimination complaints’.²⁷ Equality Australia explained that the current costs regime is inappropriate as there are considerable differences between discrimination complaints and other disputes:

Discrimination complaints go to fundamental injustices and harms to dignity...the usual costs recovery approach that may work well in commercial disputes, or disputes where monetary damages are likely to be higher or more readily calculable, is not appropriate in a discrimination context and discourages meritorious complaints from people who have been discriminated against.

2.20 Equality Australia argued that adopting a costs model based on section 570 of the Fair Work Act could ‘also undermine the effectiveness of discrimination protections because of imbalances between a typical complainant and a typical respondent’.²⁸

2.21 The Power to Prevent Coalition ‘wholeheartedly support[ed] the adoption of key principles of the Equal Access model in the Bill’.²⁹ The Coalition represents ‘a group of diverse community organisations, unions, academics, peak bodies, health professionals, lawyers and victim-survivors’ that supported the proposed costs model in the Attorney-General’s Department’s (AGD) review into an appropriate cost model for Commonwealth anti-discrimination laws.³⁰ It

²⁵ Ms Abbey Kendall, Director and Principal Solicitor, Working Women’s Centre SA, *Committee Hansard*, 31 January 2024, p. 21.

²⁶ Equality Australia, *Submission 9*, p. 2.

²⁷ Equality Australia, *Submission 9*, p. 3.

²⁸ Equality Australia, *Submission 9*, p. 2.

²⁹ Power to Prevent Coalition, *Submission 28*, p. 1.

³⁰ Power to Prevent Coalition, *Submission 28*, p. 1.

noted that its submission to the review was supported 'by 85 signatories, representing broad support across the sector for this model'.³¹

2.22 One of the signatories, the Australian Council of Trade Unions (ACTU), stated:

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.³²

2.23 The ACTU stated the bill would help:

...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 the other cost models.³³

2.24 Equality Australia argued that the modified equal access costs model would help to alleviate the burden on those who have been discriminated against:

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 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.³⁴

2.25 The Australian Human Rights Commission (AHRC) stated that the bill would provide applicants with greater costs certainty and remove the disincentives that deter them from pursuing claims of unlawful discrimination in the federal courts.³⁵ The bill would achieve this by ensuring that 'the costs provisions...are weighted more heavily in favour of applicants and shift the burden of costs liability to respondents'.³⁶

³¹ Power to Prevent Coalition, *Submission 28*, p. 1.

³² Ms Alessandra (Sascha) Peldova-McClelland, Senior Legal and Industrial Officer, ACTU, *Committee Hansard*, 31 January 2024, p. 1.

³³ Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 2.

³⁴ Mr Ghassan Kassiesieh, Legal Director, Equality Australia, *Committee Hansard*, 31 January 2024, p. 24.

³⁵ AHRC, *Submission 3*, p. 5.

³⁶ AHRC, *Submission 3*, p. 5.

2.26 The AHRC welcomed reform to the costs order legislation in federal discrimination cases and recognised ‘that the question of an appropriate cost model that is fair, certain and facilitates access to justice, is complex and reasonable minds may differ on the most beneficial model’.³⁷

2.27 It explained that as all the other measures or recommendations from the Respect@Work report are implemented or are in the process of being implemented, the bill would implement:

...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...the equal access model provides one way of trying to address that overly heavy burden on applicants.³⁸

2.28 The AGD stated:

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.³⁹

2.29 The AGD reported that it received 35 submissions in response to its public consultation on costs models and had permission to publish 31 of them.⁴⁰ Of those published submissions:

...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.⁴¹

Application to all federal anti-discrimination laws

2.30 As outlined in Chapter 1, the costs protection model would apply to all federal discrimination proceedings.

³⁷ AHRC, *Submission 3*, p. 3.

³⁸ Dr Anna Cody, Sex Discrimination Commissioner, AHRC, *Committee Hansard*, 31 January 2024, p. 43.

³⁹ Ms Anne Sheehan, First Assistant Secretary, International Law and Human Rights Division, Attorney-General’s Department (AGD), *Committee Hansard*, 31 January 2024, p. 37.

⁴⁰ Ms Claire Stephens, Acting Director, Sex and Gender Section, AGD, *Committee Hansard*, 31 January 2024, p. 41.

⁴¹ Ms Sheehan, AGD, *Committee Hansard*, 31 January 2024, p. 41.

2.31 Freedom for Faith indicated that it would be inappropriate to apply the modified equal access costs model to all federal anti-discrimination cases.⁴²

2.32 Freedom for Faith explained ‘there is a very marked difference in the power differential’ in sexual harassment cases compared to other types of discrimination.⁴³ It argued that in religious discrimination cases, for example, there have been people who:

...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.⁴⁴

2.33 Freedom for Faith suggested that the bill should be ‘restricted to solving the problem it’s trying to solve, which is sexual harassment’.⁴⁵ It raised concerns that there has not been enough public consultation in relation to changing the costs regime for other forms of discrimination, other than that interrogated by the *Respect@Work* report:

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.⁴⁶

2.34 The HRLA stated:

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 claims 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.⁴⁷

⁴² Freedom for Faith, *Submission 21*, pp. 3-4.

⁴³ Mr Michael Southon, Executive Director, Freedom for Faith, *Committee Hansard*, 31 January 2024, p. 26.

⁴⁴ Mr Southon, Freedom for Faith, *Committee Hansard*, 31 January 2024, p. 26.

⁴⁵ Mr Southon, Freedom for Faith, *Committee Hansard*, 31 January 2024, p. 29.

⁴⁶ Mr Mark Spencer, Member, Board of Reference, Freedom for Faith, *Committee Hansard*, 31 January 2024, p. 30.

⁴⁷ Mr Steenhof, HRLA, *Committee Hansard*, 31 January 2024, p. 28.

2.35 The HRLA argued ‘the test for determining the differential between two parties is not well suited to all parties who are the subject of these discrimination claims’.⁴⁸ It stated that the bill would require a respondent to satisfy several tests if it is to avoid paying the applicants’ costs:

Firstly, it needs to satisfy the test that the applicant started the 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...

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.⁴⁹

2.36 In contrast, People with Disability Australia indicated that the risk of having to pay the respondent’s costs acts as a disincentive to pursuing justice in all discrimination matters.⁵⁰ It submitted that disincentive is particularly felt by people with disability, as that community:

...face[s] economic disadvantage and an above-average risk of poverty. Indeed, a mere 48% of working-age people with disability are employed, compared to 80% of people without disability. Many of us simply cannot afford to fund our own legal representation, let alone that of another party.⁵¹

2.37 For that reason, People with Disability Australia ‘welcome[d] the Bill and its application to all federal discrimination matters’.⁵²

2.38 The Community and Public Sector Union (CPSU) supported the application of the costs model to all federal discrimination matters as it would avoid ‘increased complexity in discrimination law via the implementation of differing costs models, and addresses the fundamental power imbalances that exist in all forms of discrimination’.⁵³

2.39 The National Foundation for Australian Women shared the CPSU’s view and added:

⁴⁸ Mr Steenhof, HRLA, *Committee Hansard*, 31 January 2024, p. 26.

⁴⁹ Mr Steenhof, HRLA, *Committee Hansard*, 31 January 2024, p. 27.

⁵⁰ People with Disability Australia, *Submission 26*, p. 2.

⁵¹ People with Disability Australia, *Submission 26*, p. 2.

⁵² People with Disability Australia, *Submission 26*, p. 1.

⁵³ CPSU, *Submission 11*, p. 3.

...all forms of discrimination involve fundamental power imbalances and all applicants are likely to experience similar financial barriers to initiating proceedings. The intersectional nature of sex discrimination and sexual harassment means that victim-survivors will have often experienced multiple forms of discrimination. There is value in having a consistent approach to costs across all discrimination matters.⁵⁴

2.40 The AGD explained:

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 victim-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.⁵⁵

2.41 In relation to the test for determining the power differential between the applicant and the respondent, the AGD explained that relationship between an employer and an employee may not always constitute a power advantage in favour of the employer:

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.⁵⁶

Definition of unreasonable acts or omissions

2.42 Some submitters recommended the bill or the EM be amended to clearly articulate what constitutes an ‘unreasonable act or omission’.⁵⁷

2.43 The Grata Fund and the Public Interest Advocacy Centre ‘welcome[d] the guidance that is provided in the Bill’s Explanatory Memorandum’ related to the unreasonable acts or omissions that may apply to a successful applicant.⁵⁸

2.44 The EM states that the term ‘unreasonable acts or omissions’:

⁵⁴ NFAW, *Submission 18*, p. 2.

⁵⁵ Ms Sheehan, AGD, *Committee Hansard*, 31 January 2024, p. 37.

⁵⁶ Ms Petra Gartmann, Assistant Secretary, Human Rights Branch, Attorney-General’s Department, *Committee Hansard*, 31 January 2024, p. 39.

⁵⁷ See, for example: ACTU, *Submission 25*, p. 10; People with Disability Australia, *Submission 26*, pp. 3–4; Kingsford Legal Centre, *Submission 27*, p. 21.

⁵⁸ Grata Fund and Public Interest Advocacy Centre, *Submission 8*, p. 3.

...could apply where the applicant has unreasonably caused unnecessary delays in proceedings, failed to comply with court orders and rules, or otherwise abused the processes of the court. This is intended to be a high threshold and reserved for rare cases. 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.⁵⁹

- 2.45 People with Disability Australia 'support[ed] this interpretation of 'unreasonable act or omission', noting that any disability-related acts or omissions must not be considered 'unreasonable''.⁶⁰ It suggested those disability-related acts could include 'taking time to access supported decision-making, missing deadlines or failing to attend hearings due to psychosocial disability, difficulty accessing online hearings and issues travelling to certain hearing locations'.⁶¹ It recommended that the bill be amended to list 'what will and will not qualify as an 'unreasonable act or omission'...The list should also specify that disability-related acts and omissions cannot be deemed 'unreasonable''.⁶²
- 2.46 The Grata Fund and Public Interest Advocacy Centre stated that the guidance in the EM is unclear about whether this 'also applies to the standard of an unreasonable act and omission in paragraph 46PSA(6)(b)'.⁶³ It argued that the bill should be amended to include a subsection to clause 46PSA that would make it clear that 'certain acts including the refusal of offers of compromise should not be taken to be unreasonable for the purposes of adverse costs order considerations under paragraphs 46PSA(4) and (6)(b)'.⁶⁴
- 2.47 The ACTU recommended that the EM be amended to clearly state that the guidance in relation to 'unreasonable acts and omissions' applies to both subsections of the bill.⁶⁵ It also recommended the bill:
- ...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

⁵⁹ EM, p. 13.

⁶⁰ People with Disability Australia, *Submission 26*, p. 4.

⁶¹ People with Disability Australia, *Submission 26*, p. 4.

⁶² People with Disability Australia, *Submission 26*, p. 4.

⁶³ Grata Fund and Public Interest Advocacy Centre, *Submission 8*, p. 3. Note: proposed paragraph 46PSA(6)(b) of the bill outlines the conditions that the court may take into consideration when making the applicant liable for costs.

⁶⁴ Grata Fund and Public Interest Advocacy Centre, *Submission 8*, pp. 5–6

⁶⁵ Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 6.

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.⁶⁶

2.48 Mr Kieran Pender pointed out that anti-discrimination litigation is:

...frequently directed at non-financial outcomes—for the conduct to cease, for workplaces to improve their approach to anti-discrimination, implement training and policies and so on, to seek an apology, an acknowledgement of hurt and so on.⁶⁷

2.49 In his view, consideration of monetary offers of compromise is often 'inapposite in anti-discrimination litigation'.⁶⁸ He suggested that the bill or the EM could be amended to allow the court to form 'a holistic consideration of settlement offers and remedies sought, including non-financial claims'.⁶⁹

2.50 National Legal Aid similarly argued:

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 medication and systemic change.⁷⁰

2.51 The AGD explained that federal courts would be able to consider 'what occurs in conciliation in their decision around awarding costs':

...there's some discretion for the court to consider the circumstances around the refusal [of an offer of compromise]...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.⁷¹

2.52 It clarified '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'.⁷²

⁶⁶ Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 6.

⁶⁷ Mr Kieran Pender, *Submission 14*, p. 3.

⁶⁸ Mr Kieran Pender, *Submission 14*, p. 3.

⁶⁹ Mr Kieran Pender, *Submission 14*, p. 3.

⁷⁰ Ms Melanie Schleiger, Special Advisor, Strategic Litigation, Equality Law Program, Victoria Legal Aid, *Committee Hansard*, 31 January 2024, p. 45.

⁷¹ Ms Sheehan, AGD, *Committee Hansard*, 31 January 2024, p. 38.

⁷² Ms Sheehan, AGD, *Committee Hansard*, 31 January 2024, p. 38.

2.53 The AGD stated '[r]efusing alone is not sufficient evidence to establish unreasonableness, although, depending on the refusal it might be'.⁷³

Offers of compromise

2.54 Some submitters raised concerns about the potential for offers of compromise or Calderbank offers to effectively recreate the conditions that the bill is seeking to remedy.⁷⁴

2.55 The Australian Discrimination Law Experts Group (ADLEG) referred to Calderbank offers, which are a specific type of offer of compromise that do not comply with the *Federal Court Rules 2011*.⁷⁵ It explained that a Calderbank offer is made when:

...one party offers to settle a legal dispute on the basis that, if their offer is not accepted and the proceedings result in a verdict that is less than the sum that had been offered, the offeror will be entitled to their legal costs from the time of the rejected offer.⁷⁶

2.56 The Grata Fund and Public Interest Advocacy Centre explained that an applicant who refuses a Calderbank offer may obtain a less favourable outcome:

Calderbank offers are used by respondent employers in discrimination matters as 'part of the litigation game' to force settlement. An applicant who refuses a Calderbank offer risks an adverse costs order for indemnity costs if they proceed to litigation and ultimately receive a less favourable outcome. Similar 'offer of compromise' and costs rules are formalised under Part 25 of the *Federal Court Rules 2011 (Cth) (FCR)*.⁷⁷

2.57 They explained that Calderbank offers risk recreating the disincentives that potential applicants have in deciding to launch a discrimination case:

By pressuring applicants to settle under the threat of indemnity costs, these respondent strategies effectively recreate the costs risk and chilling effects that the Bill seeks to address. We are concerned that the Bill itself does not make any provision for how the equal access model is supposed to interact with Calderbank offer principles or the FCR regime.⁷⁸

2.58 ADLEG suggested that offers of compromise are inappropriate in discrimination cases as they often involve 'a substantial inequality of both

⁷³ Ms Gartmann, AGD, *Committee Hansard*, 31 January 2024, p. 38.

⁷⁴ See, for example: ADLEG, *Submission 1*, p. 4; Grata Fund and Public Interest Advocacy Centre, *Submission 8*, pp. 3–4; ACTU, *Submission 25*, pp. 12–13.

⁷⁵ ADLEG, *Submission 1*, p. 4.

⁷⁶ ADLEG, *Submission 1*, p. 4.

⁷⁷ Grata Fund and Public Interest Advocacy Centre, *Submission 8*, pp. 3–4.

⁷⁸ Grata Fund and Public Interest Advocacy Centre, *Submission 8*, p. 4.

power and resources' between the applicant and the respondent.⁷⁹ In discrimination cases, the respondent may:

...leverage its resources and emotional detachment to impose fear and uncertainty on a complainant in order to deter them from continuing with their claim or to accept a low offer of settlement.⁸⁰

2.59 ADLEG recommended:

...the Bill be amended to expressly exclude consideration of offers of compromise in relation to any discretion to award costs. For example, section 46PSA(5) of the Bill could be qualified by a phrase such as 'notwithstanding FCR 25.14 and any offer of compromise that was made'.⁸¹

2.60 The ACTU suggested that claimants generally prefer to avoid litigating their discrimination claims and highlighted:

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 [sic] 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.⁸²

2.61 The ACTU recommended:

...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.⁸³

⁷⁹ ADLEG, *Submission 1*, p. 4.

⁸⁰ ADLEG, *Submission 1*, p. 4.

⁸¹ ADLEG, *Submission 1*, p. 5.

⁸² Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024 p. 4.

⁸³ Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 7.

2.62 The AHRC expressed concern that the proposed costs model:

...may have unintended consequences on the efficacy of alternative dispute resolution options, including early offers of settlement and conciliation processes, and the processes of the Commission as a filter for complaints proceeding to court.⁸⁴

2.63 The Law Council stated:

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 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.⁸⁵

2.64 The AHRC recommended an amendment to the bill 'to enable the court to have regard to settlement offers made prior to, and during, the proceedings in the determination of costs'.⁸⁶ If that amendment is not made, the AHRC recommended the EM:

...be amended to include the unreasonable rejection of a settlement offer as an example of a possible 'unreasonable act or omission' under proposed ss 46PSA (4) and (6)(b).⁸⁷

⁸⁴ AHRC, *Submission 3*, p. 6.

⁸⁵ Ms Katherine Eastman AM SC, Chair, Equal Opportunity Committee, Law Council of Australia, *Committee Hansard*, 31 January 2024, pp. 14–15.

⁸⁶ AHRC, *Submission 3*, p. 4.

⁸⁷ AHRC, *Submission 3*, p. 4.

2.65 The AHRC clarified that it does not:

...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.⁸⁸

2.66 It was in favour of the court:

...retain[ing] 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 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.⁸⁹

Increased litigation

2.67 Freedom for Faith opposed the bill as it would 'undermine important checks and balances necessary to discourage low-value litigation and waste valuable court time and resources'.⁹⁰

2.68 The HRLA supported that argument and suggested:

Even in those cases which are not unmeritorious, but where serious public interest and other legitimate issues are in contention, the effect of the Bill would be to compromise the proper defence of claims, by establishing an environment in which the financial risks from adverse costs awards are excessive from the outset.⁹¹

2.69 The ACTU shared statistics that highlight the 'shockingly low' number of sexual harassment cases that proceed to court:

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.⁹²

2.70 National Legal Aid reinforced that evidence:

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

⁸⁸ Ms Melissa De Abreu, Senior Lawyer, AHRC, *Committee Hansard*, 31 January 2024, p. 42.

⁸⁹ Ms De Abreu, AHRC, *Committee Hansard*, 31 January 2024, p. 42.

⁹⁰ Freedom for Faith, *Submission 21*, p. 5.

⁹¹ HRLA, *Submission 5*, p. 1.

⁹² Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 1.

our clients have proceeded to hearing and final judgement—no sexual harassment cases.⁹³

- 2.71 The Shop, Distributive and Allied Employees' Association (SDA) echoed the view that reporting of sexual harassment at work is low and stated:

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.⁹⁴

- 2.72 The ALA was not concerned about the prospect of the modified equal access model resulting in increased litigation.⁹⁵ It stated:

...it is in the public interest for instances of sexual harassment and discrimination to progress to litigation; for victim survivors to access justice and compensation; for there to be increased awareness of workplace discrimination; and for societal norms and practices to shift as a result.⁹⁶

- 2.73 The Working Women's Centre drew a similar connection between case law and societal norms. It suggested that the risk of adverse costs orders has resulted in limited legal precedent and that increased litigation would assist in the development of the law:

Should conciliation be unsuccessful, and to proceed with unlawful discrimination cases past conciliation, it is essential for complainants and/or

⁹³ Ms Schleiger, Victoria Legal Aid, *Committee Hansard*, 31 January 2024, p. 46.

⁹⁴ Ms Katie Biddlestone, Director, Industrial, Safety and Equity Policy, SDA, *Committee Hansard*, 31 January 2024, p. 6.

⁹⁵ ALA, *Submission 12*, p. 6.

⁹⁶ ALA, *Submission 12*, p. 6.

their legal representatives to have recent legal precedent that reflects society's changing standards in respect to unlawful discrimination.

Even if there were to be an initial increase in litigation as a result of this model, development of case law in the area of unlawful discrimination will facilitate earlier settlements in due course, as Judicial consideration and decisions on relevant legal tests are crucial to enable accurate interpretations of the law.

This current deficiency of comprehensive case law in unlawful discrimination matters makes it difficult for complainants to weigh up the stressful nature of litigation against likely outcomes of their case. This lack of case law disempowers complainants in their decision making on whether they want to persevere through stressful litigation and what the risk verses [sic] reward may be in pursuing their matters.⁹⁷

2.74 The ACTU argued:

...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.⁹⁸

2.75 The ACTU argued that having more matters proceed to court would test 'the awards of damages, which are currently very low...against community standards'.⁹⁹ It suggested that an increase in the quantum of damages would:

...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.¹⁰⁰

2.76 The ACTU also recognised that there have been concerns that the bill would 'clog up courts with unmeritorious claims'.¹⁰¹ It suggested that those concerns are misplaced as:

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

⁹⁷ Working Women's Centre, *Submission 10*, p. 3.

⁹⁸ Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 2.

⁹⁹ Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 7.

¹⁰⁰ Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 7.

¹⁰¹ Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 2.

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.¹⁰²

2.77 The SDA observed that it 'regularly represents and supports members when they have workplace issues involving discrimination or when they have been sexually harassed'.¹⁰³ In doing so it seeks to ensure:

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.¹⁰⁴

2.78 The SDA indicated that in its experience:

...workers who have been harassed or discriminated against will engage in any available option to resolve their complaint, including internal external options, before they consider going to court. The proposed changes to the costs provisions will not impact on this.¹⁰⁵

2.79 The Working Women's Centre similarly stated that, in its experience:

...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.¹⁰⁶

2.80 It opined that those making the argument that claimants are unlikely to accept reasonable offers are:

...moving into territory where we're thinking about the applicants or complainants, who are predominantly women, being unreasonable...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

¹⁰² Ms Peldova-McClelland, ACTU, *Committee Hansard*, 31 January 2024, p. 2.

¹⁰³ Ms Biddlestone, SDA, *Committee Hansard*, 31 January 2024, p. 2.

¹⁰⁴ Ms Biddlestone, SDA, *Committee Hansard*, 31 January 2024, pp. 2-3.

¹⁰⁵ Ms Biddlestone, SDA, *Committee Hansard*, 31 January 2024, p. 3.

¹⁰⁶ Ms Kendall, Working Women's Centre, *Committee Hansard*, 31 January 2024, p. 23.

directions hearing 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.¹⁰⁷

2.81 Kingsford Legal Centre supported the view that very few rational people would pursue a case in a federal court.¹⁰⁸ It stated that in its experience:

...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.¹⁰⁹

2.82 National Legal Aid argued that, even if the bill is passed, most people are not going to pursue their claim in federal court:

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.¹¹⁰

2.83 Equality Australia echoed those views:

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.¹¹¹

¹⁰⁷ Ms Kendall, Working Women's Centre, *Committee Hansard*, 31 January 2024, p. 23.

¹⁰⁸ Ms Emma Golledge, Director, Kingsford Legal Centre, UNSW, *Committee Hansard*, 31 January 2024, p. 23.

¹⁰⁹ Ms Golledge, Kingsford Legal Centre, *Committee Hansard*, 31 January 2024, p. 23.

¹¹⁰ Ms Schleiger, Victoria Legal Aid, *Committee Hansard*, 31 January 2024, p. 44.

¹¹¹ Mr Kassisieh, Equality Australia, *Committee Hansard*, 31 January 2024, p. 24.

2.84 National Legal Aid agreed:

The rare individuals who pursue meritorious discrimination claims to hearing are performing an important public service and 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.¹¹²

2.85 The Working Women's Centre argued that the bill would allow a wider range of people to access the legal system and pursue justice:

...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.¹¹³

2.86 It suggested that broadening this jurisprudence would assist in bringing discrimination matters to an 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.¹¹⁴

¹¹² Ms Schleiger, Victoria Legal Aid, *Committee Hansard*, 31 January 2024, p. 45.

¹¹³ Ms Kendall, Working Women's Centre, *Committee Hansard*, 31 January 2024, pp. 24–25.

¹¹⁴ Ms Kendall, Working Women's Centre, *Committee Hansard*, 31 January 2024, p. 25.

2.87 The Grata Fund supported the view that increased case law:

...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 on the respondents to actually offer decent conciliated outcomes.¹¹⁵

2.88 The AHRC indicated:

...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...If this generates more jurisprudence in the Federal Court, that will address that particular concern, to some extent.¹¹⁶

Committee view

2.89 The Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 would repeal the existing costs provisions in the *Australian Human Rights Commission Act 1984* and replace them with 'equal access' costs protection provisions. Those provisions would apply to all unlawful discrimination proceedings commenced in the federal courts. The amendment would implement recommendation 25 of the Respect@Work report.

2.90 The committee acknowledges that people who have experienced discrimination are often reluctant to pursue litigation due to the risk of incurring costs. It is of the view that this reluctance causes significant harm to individuals and the public good.

2.91 The committee recognises that the equal access model was subject to extensive community consultation through the Attorney-General's Department's review into an appropriate cost model for Commonwealth anti-discrimination laws. That consultation process found there was significant community support for the equal access model.

2.92 The committee agrees that the modified equal access model is the most appropriate model to adopt in the awarding of costs in federal anti-discrimination cases. That model grants the courts the ability to award costs against the applicant if the respondent is: successful on all grounds; does not have a significant power advantage over the applicant; and does not have significant financial or other resources, relative to the applicant. It balances the

¹¹⁵ Ms Isabelle Reinecke, Executive Director, Grata Fund, *Committee Hansard*, 31 January 2024, p. 34.

¹¹⁶ Emeritus Professor Rosalind Croucher AM, President, AHRC, *Committee Hansard*, 31 January 2024, pp. 42–43.

interests of applicants and respondents, and achieves the policy objective of recommendation 25 of the Respect@Work report.

- 2.93 The committee therefore supports the modified equal access costs model as it addresses the power imbalances and resource disparities that often exist in discrimination cases. The model reduces the burden on respondents who are successful on all grounds but are not well-resourced or at a significant power advantage relative to the applicant.
- 2.94 The committee considers that the bill would bring conciliation out of the shadow of the law and, over the long term, assist in bringing discrimination matters to a more rapid conclusion without necessarily requiring judicial involvement.
- 2.95 The committee notes that the explanatory memorandum provides guidance in relation to what constitutes the ‘unreasonable acts and omissions’ of the applicant that the court may consider in making the respondent liable for costs. The explanatory memorandum does not similarly outline what constitutes the ‘unreasonable acts and omissions’ of the applicant when the court considers making the applicant liable for costs.
- 2.96 The committee received evidence from multiple stakeholders on this issue and considers that greater clarity is required to properly explain what constitutes the ‘unreasonable acts and omissions’ of the applicant when the court considers making the applicant liable for costs.

Recommendation 1

- 2.97 The committee recommends that the bill or the explanatory memorandum be amended to clarify what constitutes the ‘unreasonable acts or omissions’ of the applicant when the court considers making the applicant liable for costs.**

Recommendation 2

- 2.98 Subject to the preceding recommendation, the committee recommends that the Senate pass the bill.**

Senator Nita Green
Chair
Labor Senator for Queensland

Dissenting report by Senator Paul Scarr

Introduction

- 1.1 I thank all those who made submissions to the inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (the Bill). In particular, I would like to thank everyone who appeared to give evidence at the hearing held on 31 January and those who answered questions on notice within the relatively short period of time (please rest assured that I reviewed and considered your answers).
- 1.2 I would also like to extend my appreciation to those witnesses who appeared at the inquiry. Many of the witnesses advocate for and represent those impacted by sexual harassment and discrimination. This is incredibly important work.
- 1.3 The weight of the matters being considered by the Committee was exemplified by the testimony provided by Ms Melanie Schleiger of Victoria Legal Aid who described her experiences in advising clients who are victims of sexual harassment:

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.¹
- 1.4 There is strong evidence that there are issues with the current system that need to be addressed. There is largely consensus in this regard. However, there is no consensus with respect to the costs model which should apply to proceedings commenced under Part IIB, Division 2 of the *Australian Human Rights Commission Act 1986* (the AHRC Act). As the submissions and testimony to the Committee evidence, this is a contested area.
- 1.5 This was perhaps best summed up by the evidence of the Australian Human Rights Commission (AHRC) who stated:

The Commission acknowledges that the question of an appropriate cost model that is fair, certain and facilitates access to justice, is complex and reasonable minds may differ on the most beneficial model. The Commission welcomes reform of these laws.²
- 1.6 Having participated in two inquiries in relation to these issues, I agree – reasonable minds may differ on the most beneficial model. There are numerous models, and each has its advantages and disadvantages. However, it

¹ Ms Melanie Schleiger, Special Advisor, Strategic Litigation, Equality Law Program, Victoria Legal Aid, *Committee Hansard*, 31 January 2024, p. 47.

² Australian Human Rights Commission (AHRC), *Submission 3*, p. 3.

is incumbent on the Committee to weigh the evidence and make a recommendation to the Senate with respect to the cost model proposed in the Bill.

Consideration of relevant background to the cost model proposed in the Bill

1.7 The vexed nature of the issue being considered is illustrated by the fact that the matters dealt with in this Bill relate to the last remaining recommendation requiring legislative reform made in the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report* (the Respect@Work report).³ The relevant recommendation is recommendation 25; namely:

Amend the Australian Human Rights Commission Act to insert a cost protection clause consistent with section 570 of the *Fair Work Act 2009 (Cth)*.⁴

1.8 Section 570 of the *Fair Work Act 2009 (Cth)* provides:

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

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

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

1.9 As discussed in the Majority Report, evidence received by the Commission indicated that: 'the current costs regime, where costs follow the event, operates as a disincentive to pursuing sexual harassment matters under the [*Sex Discrimination Act 1984*]'.⁵

³ Refer to paragraph 1.11 of the Majority Report.

⁴ AHRC, [Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces](#) (Respect@Work report), 2020, p. 45.

⁵ AHRC, [Respect@Work report](#), 2020, p. 507.

- 1.10 In weighing the evidence referred to above, the Commission came to the following view:

The Commission acknowledges the concerns raised in submissions regarding the risk of cost orders acting as a disincentive to pursuing the sexual harassment matters in the federal jurisdiction. The Commission is concerned about the negative impact on access to justice, particularly for vulnerable members of the community.

Accordingly, the Commission considers that the Australian Human Rights Commission Act be amended to insert a cost protection provision consistent with section 570 of the Fair Work Act 2009 (Cth). Such a provision should ensure costs may only be ordered against a party by the court if satisfied that the party instituted the proceedings vexatiously or without reasonable cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs.⁶

- 1.11 Subsequent to the issue of the *Respect@Work* report, the AHRC completed a further report with respect to reform of discrimination laws more generally; namely: *Free & Equal: A reform agenda for federal discrimination laws* (the Free and Equal Report).⁷ With respect to the issue of costs, the Commission made the following observations:

There are presently no specific provisions relating to costs in unlawful discrimination proceedings before the Federal Circuit Court and the Federal Court. These courts have a general discretion to order costs under the provisions of their establishing acts and generally exercise these powers according to the guiding principle that 'costs follow the event'. Under this principle, an unsuccessful party to litigation is ordinarily ordered to pay the costs of the successful party.

While courts have the discretion to depart from this approach in certain circumstances – and also the power to make cost-capping orders – concerns have been raised that the threat of an adverse costs order discourages the pursuit of legitimate discrimination claims in the courts. The time and cost of litigation are also reasons identified for settling prior to court.⁸

- 1.12 The Commission then came to the view:

After considering the competing arguments, the Commission considers that the default position should be that parties bear their own costs, as contained in the Human Rights and Anti-Discrimination Bill 2012 (HRAD Bill), with the court retaining a discretion to award costs in the interests of justice. The Commission considers, however, that clarity should be provided by amendment to the Australian Human Rights Commission Act (Cth) (AHRC Act) to include mandatory criteria to be considered by the courts in determining whether to award costs in the interest of justice. The list

⁶ AHRC, [Respect@Work report](#), 2020, p. 507.

⁷ AHRC, [Free and Equal: A reform agenda for federal discrimination laws](#) (the Free and Equal report), 2021; AHRC, [Respect@Work report](#), 2020, p. 45.

⁸ AHRC, [Free and Equal report](#), 2021, p. 191.

included in the HRAD Bill, which was based on the Family Law Act 1975 (Cth) (Family Law Act), is an instructive one.⁹

1.13 The HRAD Bill (referred to above) provided that in considering whether the circumstances justify departing from the default position that each party is to bear their own costs, the court was to have regard to the following matters:

- (a) the financial circumstances of each of the parties to the proceedings;
- (b) whether any party to the proceedings is receiving assistance [from the Attorney General's Department or by way of legal aid and the nature and terms of any such assistance;
- (c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission);
- (d) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- (e) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer; and
- (f) any other matters that the court considers relevant.¹⁰

1.14 The above then became the basis for what was referred to in the Free and Equal Report as: 'Major Reform 3 – Enhancing Access to Justice'.¹¹

1.15 The recommendation contained in the Free and Equal Report then became the basis for the costs model proposed in the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (the ADHRLA Bill 2022).¹² The matters enumerated in the HRAD Bill were replicated in the ADHRLA Bill 2022. There was the addition of a further matter; namely: 'whether the subject matter of the proceedings involves an issue of public importance'.¹³

1.16 The ADHRLA Bill 2022 was the subject of an inquiry by this Committee. The Committee tabled its report in November 2022.

1.17 The position of a majority of the Committee is discussed at paragraphs 1.18 and 1.19 of the Majority Report for this inquiry. In essence, the majority recommended adoption of the proposed costs model with a review to be undertaken by the Australian Law Reform Commission 6 to 12 months after passage of the ADHLRA Bill 2022.

⁹ AHRC, [Free and Equal report](#), 2021, p. 191.

¹⁰ AHRC, [Free and Equal report](#), 2021, p. 199.

¹¹ AHRC, [Free and Equal report](#), 2021, p. 337.

¹² Schedule 5 of the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.

¹³ Proposed subsection 46PSA(3) of the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.

1.18 In additional comments, I made the following observations:

1.45 Based on the evidence before the committee, there is a material question as to whether the change in the cost recovery regime may lead to unintended consequences. Under the current law, costs typically ‘follow the event’. The court has discretion to award costs and in most cases the unsuccessful party will be ordered to pay the costs of the successful party.

1.46 Where a potential plaintiff has a strong case, this has the benefit that:

- (a) The plaintiff may be better able to access legal support from barristers and solicitors on a ‘no-win, no-fee’ basis because the barristers and solicitors having assessed the merits of the case will have a level of confidence with respect to the payment of costs; and
- (b) The likelihood of a costs order may be used as leverage by a plaintiff in settlement negotiations (the defendant will be advised that they have the risk of not only having to pay damages but also having to meet both their own costs and those of the plaintiff). This means that a claim may be settled earlier.

1.47 Complicating the matter is that claims may be brought against a wide range of potential defendants. Some will be large corporates with great financial resources. However, other potential defendants will be small businesses with financial constraints. In such situations, the argument for adoption of an ‘equal access’ costs approach advocated by some stakeholders is weaker.¹⁴

1.19 Having had the benefit of the evidence provided during the course of this inquiry, I have not materially changed my view.

1.20 On the basis of the above observations, I made the following recommendation:

Recommendation 5: Further consideration be given to the appropriate costs allocation principles to avoid unintended consequences.¹⁵

1.21 It should be noted that the Greens in their additional comments to the report, recommended an equal access scheme for the costs model.

1.22 Subsequent to the tabling of the report, the Federal Government received strong representations that it should re-consider its cost model approach.

1.23 The Government acted on the feedback it received from stakeholders. On 25 January 2023, the Government responded to my recommendation 5 in the following terms:

¹⁴ Senate Legal and Constitutional Affairs Legislation Committee, *Report into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]*, November 2022, p. 49.

¹⁵ Senate Legal and Constitutional Affairs Legislation Committee, *Report into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]*, November 2022, p. 50.

The Government supports this recommendation. The Government carefully considered the Committee's report and listened to stakeholder concerns in relation to the cost protection provisions originally in the Bill, which were based on a recommendation of the Australian Human Rights Commission. As a result of these considerations the Government moved amendments to remove the cost protection provisions from the Bill. The Government has referred the issue of costs in discrimination proceedings to the Attorney-General's Department for review. That review will begin immediately and be completed in May 2023. The Government intends to legislate the costs model recommended by that review as quickly as possible.¹⁶

- 1.24 The subsequent review undertaken by the Attorney General's Department is discussed at paragraphs 1.21 to 1.44 of the Majority Report.
- 1.25 One of the issues that the consultation process had to grapple with (as does this Committee) is that at a Federal level there is no intermediate level (low-cost tribunal stage) for resolution of disputes. This differs from the position at a State level.
- 1.26 As noted in the consultation paper:

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

Across the majority of states and territories, the costs model adopted for tribunals to apply at the intermediate stage is soft costs neutrality – whereby the default position is that parties bear their own costs, but the tribunal retains discretion to award costs otherwise where it considers this appropriate (often in reference to a list of prescribed factors – exhaustive or non-exhaustive).¹⁷

- 1.27 The reason for this can be traced back to the *Brandy Case* where the High Court found that at a federal level there must be a separation of judicial powers (on the one hand) from the executive and legislative powers (on the other hand).¹⁸ The judicial function may only be exercised by courts established under section 71 of the Constitution.¹⁹ This adds another challenge to the reform process.

¹⁶ Australian Government, *Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]*, 25 January 2023, p. 5.

¹⁷ Attorney-General's Department (AGD), [Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws](#), February 2023, p. 12.

¹⁸ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.

¹⁹ It is noted that Emeritus Professor Rosalind Croucher AM, President, AHRC referred to the Brandy case in her opening statement at the hearing of the Committee held on 31 January 2024. See:

1.28 Following the consultation process, the Government introduced this Bill which proposes a so-called: ‘modified equal access cost protection provision’. The reasons for the Government’s proposal are detailed in paragraphs 1.45 to 1.49 of the Majority Report. As stated at paragraph 1.47 of the Majority Report, the Government considers that this meets the policy objective of recommendation 25 of the Respect@Work report.

Costs model proposed in the Bill differs from the Australian Human Rights Commission recommendations

1.29 Whilst the Government considers that the costs model proposed in the Bill meets the policy objective of recommendation 25 of the Respect@Work report, it is different from the model proposed in that recommendation. Further, it is different from the model proposed by the AHRC in the Free & Equal Report. This was explained by Emeritus Professor Rosalind Croucher, President of the AHRC during her testimony to the Committee:

Senator SCARR: 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.²⁰

1.30 The President’s testimony at the hearing on 31 January reflected the submission of the AHRC which stated:

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. **In the Commission’s view,**

Emeritus Professor Rosalind Croucher AM, President, AHRC, *Committee Hansard*, 31 January 2024, p. 36.

²⁰ *Committee Hansard*, 31 January 2024, p. 39.

these models represent a more balanced approach to costs for claims of unlawful discrimination.²¹ [my emphasis added].

1.31 The departure from the previous recommendations made by the AHRC caused concern for the Law Council of Australia who stated:

12. The Law Council is also concerned that the equal-access model as proposed in the Costs Protection Bill was not recommended by the AHRC, either in its *Respect@Work* or *Free and Equal* reports. If the Costs Protection Bill is passed, there is potential for the model's expansion to other areas of law that are also beneficial or remedial in nature, and in which disparities of power between parties are common. This may exacerbate the potential ramifications described [in the Law Council of Australia's submission].²²

Impact on prospects of settling discrimination matters

1.32 The AHRC was concerned that the operation of the provisions in the Bill may impede the settlement of matters:

As Australia's National Human Rights Institution, the Commission is concerned that the reforms proposed may have unintended consequences on the effectiveness of alternative dispute resolution options aimed at facilitating early resolution of complaints, including settlement offers and the Commission's conciliation function, and may impact on the Commission's role in stemming the flow of complaints that proceed to court...

The Commission raises concerns that the model proposed in the Bill may have unintended consequences on the efficacy of alternative dispute resolution options, including early offers of settlement and conciliation processes, and the processes of the Commission as a filter for complaints proceeding to court. First, the Bill removes s 46PSA of the AHRC Act, which currently provides that the court, in deciding whether to award costs in proceedings, may have regard to offers to settle.²³

1.33 It is noted that a number of stakeholders contested this view. However, the AHRC's view is informed by their experience in operating the conciliation function of the AHRC. This was drawn out in the following exchange at the hearing:

Senator SCARR: 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.

²¹ AHRC, *Submission 3*, p. 5.

²² Law Council of Australia (Law Council), *Submission 33*, p. 7.

²³ AHRC, *Submission 3*, p. 6.

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 in respect to engagement and 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.²⁴

1.34 As explained by the President of the AHRC, Emeritus Professor Rosalind Croucher:

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.²⁵

1.35 This echoed the sentiments of the Law Council of Australia who submitted:

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

²⁴ *Committee Hansard*, 31 January 2024, pp. 39–40.

²⁵ *Committee Hansard*, 31 January 2024, p. 36.

processes available in the courts and settlement negotiations. It could also render offers of compromise and Calderbank offers ineffective.²⁶

1.36 The AHRC considered it important that the Bill expressly provides that the Court may have regard to settlement offers (a number of stakeholders considered the opposite; namely that the Bill should expressly exclude the consideration of settlement offers).

1.37 The AHRC recommended as follows:

The Commission recommends that the Bill be amended to enable the court to have regard to settlement offers made prior to, and during, the proceedings in the determination of costs.²⁷

1.38 The Law Council of Australia had similar concerns stating:

The Law Council agrees with the concerns expressed by the AHRC that the operation of these two amendments may mean that there is no or minimal incentive for an applicant to consider a reasonable offer to settle a matter during the AHRC stage, early in the trial preparation or at all. The courts are not precluded from considering the applicant's response to settlement offers. However, having regard to the 'high threshold/rare cases' guidance in the Explanatory Memorandum, it is questionable whether, in most cases, the failure to accept a reasonable settlement offer will engage proposed section 46PSA(4) or section 46PSA(6)(b). As noted by the AHRC, this contrasts with the position under the FW Act, where the term 'unreasonable act or omission' has been interpreted to include the unreasonable rejection of a settlement offer.²⁸

1.39 Consistent with the above arguments, the AHRC recommended that the court should also be able to have regard to whether the parties participated in the AHRC's complaints process.

1.40 In this regard, the AHRC made the following observations with respect to the Bill:

Additionally, unlike the Fair Work Act, the Bill and Explanatory Memorandum explicitly exclude from the court's consideration whether the parties unreasonably refused to participate in the complaints process before the Commission...

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, significantly hampering the effectiveness of the Commission's functions and processes.²⁹

²⁶ Law Council, *Submission 33*, p. 6.

²⁷ AHRC, *Submission 3*, p. 4.

²⁸ Law Council, *Submission 33*, p. 16.

²⁹ AHRC, *Submission 3*, p. 6.

1.41 After considering these matters, the AHRC made the following recommendation:

The Commission recommends that the Bill be amended to enable the court to have regard to the participation of the parties in the Commission's complaints process in the determination of costs, to align with s 570(2)(c) of the Fair Work Act.³⁰

1.42 Again, the Law Council of Australia agreed with the concerns of the AHRC:

Similarly, there may be little incentive under the Costs Protection Bill for applicants to engage meaningfully in the AHRC's conciliation processes. These are, in the Law Council's view, essential to ensuring fairness, effective and speedy resolution, and efficiency. They assist parties to better understand the other parties' perspective, and their own position under the relevant law. This can assist in managing unrealistic expectations and prevent unmeritorious contentions from being made by either party in court, at the more expensive end of the system.³¹

1.43 If the Bill proceeds, I strongly agree with the recommendations of the AHRC in this regard. The courts should have the discretion to consider whether settlement offers are made and the participation of parties in the AHRC's complaint processes.

Unintended consequences – impact on operation of the AHRC

1.44 The AHRC observed that the AHRC's grounds of termination of a complaint will have elevated importance under the Bill. This is because it will be the final barrier to a respondent's costs exposure under the provisions of the Bill.

1.45 Under the Bill, respondents could be reasonably expected to engage in the processes relating to termination of a complaint to maximise their prospects of minimising their exposure to the cost model under the Bill. In turn, this could place an unintended additional administrative burden on the AHRC.

1.46 The AHRC explained their concerns as follows:

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.³²

1.47 In my view, this unintended consequence has not been adequately addressed.

³⁰ AHRC, *Submission 3*, p. 4.

³¹ Law Council, *Submission 33*, p. 17.

³² AHRC, *Submission 3*, p. 7.

Broader application of cost model than sexual harassment cases

1.48 Whilst much attention has been paid to the application of the proposed cost model in sexual harassment cases (and rightly so), the Bill will apply to all claims brought to the court under federal anti-discrimination laws. This was confirmed by the Attorney General's Department at the hearing:

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.³³

1.49 The broad application of the Bill to federal discrimination claims was the subject of the following exchange at the hearing with Mr Steenhof of the Human Rights Law Alliance:

Mr Steenhof: 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...³⁴

1.50 The broader application of the cost model proposed in the Bill to religious institutions was raised by a number of stakeholders. Refer to the following extract from the submission of the Human Rights Law Alliance:

This Bill will further imperil Christian schools by making them liable for the costs of any strategic discrimination lawfare that is partially successful. Schools will not be able to pursue claimants in costs for vexatious or worthless claims that are made that seek to weaponise discrimination laws. The Bill will be detrimental to Christian schools and will further erode the

³³ Ms Anne Sheehan, First Assistant Secretary, International Law and Human Rights Division, AGD, *Committee Hansard*, 31 January 2024, pp. 37–38.

³⁴ Mr John Steenhof, Managing Director, Human Rights Law Alliance, *Committee Hansard*, 31 January 2024, p. 27.

fundamental rights of parents to ensure the religious and moral education of their children in conformity with their own convictions...³⁵

1.51 The Freedom for Faith submission was made to the inquiry on behalf of the following churches: Australian Baptist Ministries, Australian Christian Churches, Anglican Church Diocese of Sydney, Presbyterian Church of Australia in NSW and Seventh-day Adventist Church.³⁶ They made the following points in their submission:

12. In addition, the Respect@Work report recommendation only dealt with cases involving allegations of sexual harassment, whereas the coverage of the Bill extends to allegations of sex discrimination (not the same thing as the separate ground of harassment), and discrimination on all grounds available under Commonwealth law (which will include a number of grounds covered by the Sex Discrimination Act 1984 (Cth) (“SDA”), as well as discrimination on the basis of age, disability and race, and presumably any future additional grounds). We agree with the criticisms of the Bill made by the Christian Schools submission that ‘The unbalanced nature of the proposals is an invitation for activist and punitive litigation, with low prospects of success but having the aim merely to generate media attention and create inconvenience...’ Although the focus of the Christian Schools submission was the impact on the education section, the same religious freedom concerns arise for religious organisations and people of faith generally.³⁷

Insufficient safeguards to protect charities, small business and individual respondents

1.52 The AHRC raised concerns that the proposed Bill insufficiently balanced fairness to smaller sized respondents stating:

The Commission is also concerned with the way the proposed reforms balance fairness to smaller sized respondents.³⁸

1.53 In this regard, the Law Council of Australia observed:

As well as its potential ramifications for the effective conduct of litigation and pre-trial settlement, this may impact respondents, including individuals, small business operators, charities and schools. Under the Costs Protection Bill, these respondents may find themselves unable to be recompensed for their costs, even where they successfully defend a claim. It may disincentivise respondents from being legally represented in proceedings, to reduce their overall risk and exposure to costs.³⁹

³⁵ Human Rights Law Alliance, *Submission 5*, p. 3.

³⁶ Freedom for Faith, *Submission 21*, p. 1.

³⁷ Freedom for Faith, *Submission 21*, p. 4.

³⁸ AHRC, *Submission 3*, p. 5.

³⁹ Law Council, *Submission 33*, p. 6.

1.54 The Australian Chamber of Commerce & Industry was similarly concerned that the safeguards in the Bill were inadequate providing the following analysis with respect to each of the proposed safeguards:

Accordingly, the ground of vexatiousness will generally not entitle a successful respondent employer to obtain compensation for the legal costs they incurred unless they can prove that the applicant had some ulterior motive behind bringing the proceedings...

The availability of the 'without reasonable cause' ground would be similarly elusive for most successful respondent employers. It will only apply where, as held by French J in *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch) (No 2) (1993) 46 IR 301*, 'the applicant properly advised should have known it had no chance of success' or the 'party persists in what should on proper consideration be seen to be a hopeless case'...

Unless an employer is able to prove that no points of law affecting the outcome of the proceeding were arguable, this ground would not apply. An employer facing highly speculative litigation with extremely low (but arguable) prospects of success) will be deprived of compensation for their legal costs incurred.

The third exemption to the rule that an applicant is generally protected from cost awards applies where all of three criteria are met. First, the other party must be a 'respondent who was successful in the proceedings': section 46PSA(6)(c)(i). This requirement is straightforward. Second, the respondent must 'not have a significant power advantage over the applicant': section 46PSA(6)(c)(ii). The explanatory memorandum accompanying the legislation provides at [18] an example of such 'a significant power advantage' which is where: "the respondent is an individual applicant's employer". Third, the respondent must 'not have significant financial or other resources relative to the applicant': section 46PSA(6)(c)(iii). It is difficult to conceive of a scenario in which a business, even where it faces substantial financial difficulties, would not have 'significant financial or other resources relative to' an individual employee. Collectively, these requirements create a result that is highly prejudicial to employer respondents. If the explanatory memorandum's explication of the provisions is correct, in proceedings brought by an employee against an employer, the employer would be deprived of access to this exemption virtually by default; they would always be deemed to, at minimum, not comply with paragraph (c)(ii), and, in most cases, likely (c)(iii) as well. This means that this exemption would generally only apply to non-employer respondents. This neglects recognition of the significant costs incurred by employers, particularly those in small businesses, in litigation of discrimination complaints. As alluded to earlier, these costs comprise not only legal fees, but also diversion away from managing the business and potential damage to their reputation, even where they are ultimately successful.⁴⁰

⁴⁰ Australian Chamber of Commerce and Industry, *Submission 34*, pp. 10–11.

- 1.55 This is a very important point. Whilst the Government may say that there are safeguards in the Bill, once one works through the proposed safeguards in the context of the explanatory memorandum, the safeguards become nugatory.
- 1.56 This was further drawn out during the hearing in the following exchange I had with Ms Jessica Tinsley, General Counsel at the Australian Chamber of Commerce and Industry:

Senator SCARR: 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...

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.⁴¹

- 1.57 The concerns of the Australian Chamber of Commerce and Industry were echoed by the Human Rights Law Alliance as evidenced by the following exchange at the hearing:

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 an 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

⁴¹ *Committee Hansard*, 31 January 2024, p. 10.

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... 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.⁴²

1.58 In commenting on this matter, the Law Council of Australia made the following observations:

The modifications in question take into account the fact that not all respondents to discrimination claims will have a significant advantage over the applicant in terms of resources or power (for example, being in a position to affect the applicant's employment). **However, this leaves intact the possibility that respondents who are not at fault and against whom unmeritorious claims are brought, will be required to pay the costs for the burden of disproving these claims** [my emphasis added]. This will occur where respondents are considered to have a significant power advantage over, and significantly greater financial/other resources than, the applicant—even though the applicant was unsuccessful in making out their sexual harassment or unlawful discrimination claim. The Law Council's consultations with practitioners revealed that, in their experience, many respondents in discrimination cases are in fact not well-resourced or powerful. That is, respondents are not all large corporations or government agencies. They may include, for example, schools, charities, small business operators, and individuals such as co-workers in the workplace, teachers or students in education settings, and volunteers who provide goods, services and facilities.⁴³

1.59 Can the issues referred to above be mitigated by potential respondents simply procuring insurance? In the context of faith-based schools, the issues were canvassed at the hearing in the following exchange with Mr Mark Spencer, representing Freedom for Faith:

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

⁴² *Committee Hansard*, 31 January 2024, p. 28.

⁴³ Law Council, *Submission 33*, p. 15.

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.⁴⁴

- 1.60 Hence, it is no answer to the issues raised by stakeholders to simply say that potential respondents can simply procure insurance. There are cost consequences, especially for not-for-profit institutions.

Further considerations – no precedent for this approach in Australia

- 1.61 The Law Council of Australia reflected on the principles underlying the provisions of the Bill which would treat respondents differently based on their power or financial means as follows:

Further, as a matter of principle, it is inappropriate for the courts routinely to treat parties differently based on their power or financial means relative to other parties, particularly where they have not engaged in unlawful conduct.⁴⁵

- 1.62 This is an important point. It underlines the fact that what is proposed in this Bill is unique and without precedent in an Australian legal context. The Senate would do well to reflect on the following observations of the Law Council of Australia:

Although not an argument against adoption per se, the Law Council also raises for the Committee's consideration the fact that the equal-access model has not been adopted in any other comparable Australian discrimination law jurisdiction, and is therefore effectively untested.⁴⁶

- 1.63 Moreover, if the proposed approach is adopted in the discrimination law context, then the argument will be that the same approach should be applied in

⁴⁴ *Committee Hansard*, 31 January 2024, pp. 27–28.

⁴⁵ Law Council, *Submission 33*, p. 15.

⁴⁶ Law Council, *Submission 33*, p. 18.

multiple other contexts. Hence, the issues raised in this Bill go further than just the discrimination context. As observed by the Law Council of Australia:

The Law Council is conscious that should the Costs Protection Bill proceed, it may lead to adoption of the equal-access model with respect to other laws that are considered beneficial or remedial, and where disparities of power between parties commonly exist. It notes in this context that a variety of statutes have been accepted by the courts as being beneficial or remedial in nature. These concern subject matter such as Aboriginal land rights, native title and heritage, bridging visas, consumer protection, family law, social security, veterans' entitlements, workers' compensation and workplace relations.⁴⁷

Conclusion

- 1.64 Having carefully considered the evidence, I have the following material concerns with respect to the cost model proposed in the Bill.
- 1.65 The model differs from that proposed by the AHRC in both the Respect@Work Report and the Free and Equal Report. Whilst the AHRC strongly support the policy intent and the need for reform, the AHRC considers the cost model in its recommendation in the Free and Equal Report to be a: 'more balanced approach'. The fact that such a fiercely independent institution such as the AHRC considers that there are more balanced approaches than that proposed in the Bill should be a concern for all Senators.
- 1.66 The concerns held by the AHRC are also held even more strongly by the Law Council of Australia. The Law Council of Australia is concerned that the Bill may result in an increase in unmeritorious claims which will lead to protracted litigation impacting the efficiency of our justice system. This represents a material red flag which should be carefully considered by all Senators. Ultimately, the Law Council of Australia came to the following conclusion:
- Nevertheless, **after extensive consultations, and recognising that there is a range of views amongst the legal profession, on balance, the Law Council does not support the measures in the Costs Protection Bill** [my emphasis added].⁴⁸
- 1.67 I agree with the views of the AHRC, the Law Council of Australia and other stakeholders that the proposed cost model would impede the settlement of matters. Whilst the evidence is contested, the arguments made by a range of stakeholders are extremely strong.
- 1.68 The protections for small business, charitable organisations, not-for-profits, and individuals who are successful in defending claims and seek compensation for their legal costs are problematic. There is strong evidence that meeting the relevant thresholds to obtain a costs order may be impractical. This was

⁴⁷ Law Council, *Submission 33*, p. 20.

⁴⁸ Law Council, *Submission 33*, p. 6.

illustrated in the hearing when I had the following exchange with the Attorney-General's Department:

Senator SCARR: Okay. Could I take you to [paragraph 18 of the explanatory memorandum]. 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.' ...**But there's nothing in 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. [my emphasis added].⁴⁹

- 1.69 The Bill would apply in a much wider range of circumstances than sexual harassment and sex discrimination cases. The provisions of the Bill would apply to discrimination complaints concerning the provision of goods and services, transport, accommodation, sale of land, education, sporting clubs and in other areas. They would apply to complaints against individuals, small businesses, not-for-profits and community organisations. They would apply in relation to alleged discrimination on grounds including race, disability, age and potentially religious belief or activity. They may apply in representative proceedings and in appellate level litigation. They may apply to counter-claims made in the course of litigation. Is it appropriate to deprive the courts of discretion and apply the same cost model across such a wide ambit of claims? In my view, given the concerns which have been raised, the case has not been made out.
- 1.70 In summary, the Bill as presently drafted creates complexity and risk for all those who might ever find themselves responding to a complaint, even if the complaint is unmeritorious. It would deprive the courts of the ability to exercise their discretion to consider all factors which may be relevant to making a costs order. This is in the context of: (a) there being no precedent for such an approach

⁴⁹ Ms Petra Gartmann, Assistant Secretary, Human Rights Branch, AGD, *Committee Hansard*, 31 January 2024, pp. 38–39.

under Australian law; and (b) the AHRC having proposed more balanced approaches.

1.71 On the basis of the above, I make the following recommendations:

Recommendation 1

1.72 It is recommended that the Bill be amended to either: (a) implement the model originally recommended by former Commissioner Jenkins in recommendation 25 of the Respect@Work report; or (b) adopt a model that retains the general rule that costs follow the event with the Court having a discretion to consider any relevant additional factors in making a costs order.

Recommendation 2

1.73 If the Bill is not amended in either of ways proposed above, it is recommended the Bill not be passed.

**Senator Paul Scarr
Deputy Chair
Liberal Senator for Queensland**

Additional Comments from the Australian Greens

- 1.1 The Greens welcome the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023.
- 1.2 The modified 'equal access' cost protection provision put forward in this Bill is one the Greens and many advocates have called for, and will ensure that no-one is priced out of fighting sexual harassment and discrimination in the workplace.
- 1.3 We agree with many of the inquiry participants that costs should not be the determining factor in whether workers are prepared to call out bad behaviour and insist on a safe workplace.
- 1.4 As we heard throughout the inquiry, without an equal access cost model in place, many workers, particularly women, weigh up the trauma and financial risk and decide to stay silent. It shouldn't bankrupt vulnerable Australians to take up a matter of sexual harassment or discrimination.
- 1.5 The 2022 National Survey of Sexual Harassment found that young women working in the fast-food and retail industries are experiencing significantly higher rates of harassment. These industries are comparatively low paid and characterised by unpredictable and insecure work. The modified equal access costs model in this Bill will help protect young women in these industries and it will help set the standard for workplace behaviour.
- 1.6 Equal access costs protections already exist for whistleblowers. We are happy to support changes that will see these same protections applied to workplace harassment.
- 1.7 The Greens are proud to have kept the pressure up to ensure that no-one is priced out of fighting for their rights at work, whether that be for sexual harassment or any other type of discrimination.

Senator Larissa Waters
Greens Senator for Queensland

Appendix 1

Submissions and Additional Information

- 1 Australian Discrimination Law Experts Group
- 2 Diversity Council Australia
- 3 Australian Human Rights Commission
- 4 Adventist Schools Australia, Australian Association of Christian Schools and Christian Schools Australia
- 5 Human Rights Law Alliance
- 6 Australian Christian Lobby
- 7 Migrant Justice Institute
- 8 Grata Fund and Public Interest Advocacy Centre
- 9 Equality Australia
- 10 The Working Women's Centre SA Inc
- 11 Community and Public Sector Union
- 12 Australian Lawyers Alliance
- 13 Australian Institute of Company Directors
- 14 Mr Kieran Pender
 - Attachment 1
- 15 Mr Bernard Gaynor
- 16 Free Speech Union of Australia
- 17 Australian Catholic Bishops Conference
- 18 National Foundation for Australian Women
- 19 FamilyVoice Australia
- 20 Mr David A W Miller
- 21 Freedom for Faith
- 22 National Legal Aid
 - Attachment 1
- 23 Shop, Distributive and Allied Employees' Association
- 24 Attorney-General's Department
- 25 Australian Council of Trade Unions
- 26 People with Disability Australia
- 27 Kingsford Legal Centre
 - Attachment 1
- 28 Power to Prevent Coalition
- 29 Clubs Australia
- 30 *Name Withheld*
- 31 Rev David Fitzgerald-Maher
- 32 Law Society of NSW
- 33 Law Council of Australia

- Attachment 1

- 34 Australian Chamber of Commerce and Industry
- 35 Aboriginal Legal Service (NSW/ACT)
- 36 *Name Withheld*
- 37 Rhonda Daley

Answer to Question on Notice

- 1 Grata Fund and Public Interest Advocacy Centre, Answers to spoken questions on notice, 31 January 2024 (received 5 February 2024)
- 2 Human Rights Law Alliance, Answers to spoken questions on notice, 31 January 2024 (received 5 February 2024)
- 3 Australian Lawyers Alliance, Answers to spoken questions on notice, 31 January 2024 (received 5 February 2024)
- 4 National Legal Aid, Answers to spoken questions on notice, 31 January 2024 (received 6 February 2024)
- 5 Australian Human Rights Commission, Answers to spoken questions on notice, 31 January 2024 (received 6 February 2024)

Tabled Documents

- 1 Opening statement made by the Shop, Distributive and Allied Employees' Association at a public hearing on 31 January 2024
- 2 Opening statement made by the Australian Council of Trade Unions at a public hearing on 31 January 2024
- 3 Opening statement made by the Australian Chamber of Commerce and Industry at a public hearing on 31 January 2024
- 4 Opening statement made by the Australian Discrimination Law Experts Group at a public hearing on 31 January 2024
- 5 Opening statement made by the Australian Lawyers Alliance at a public hearing on 31 January 2024
- 6 Opening statement made by the Law Council of Australia at a public hearing on 31 January 2024
- 7 Opening statement made by Equality Australia at a public hearing on 31 January 2024
- 8 Opening statement made by The Working Women's Centre South Australia at a public hearing on 31 January 2024
- 9 Opening statement made by Freedom for Faith at a public hearing on 31 January 2024
- 10 Opening statement made by Grata Fund at a public hearing on 31 January 2024

- 11 Opening statement made by People with Disability Australia at a public hearing on 31 January 2024
- 12 Opening statement made by the Australian Human Rights Commission at a public hearing on 31 January 2024
- 13 Opening statement made by the Attorney-General's Department at a public hearing on 31 January 2024
- 14 Opening statement made by National Legal Aid at a public hearing on 31 January 2024

Appendix 2

Public hearings

Wednesday, 31 January 2024

Room 2S3

Parliament House

Canberra

Shop, Distributive and Allied Employees' Association

- Ms Katie Biddlestone

Australian Council of Trade Unions

- Ms Sascha Peldova-McClelland

Australian Chamber of Commerce and Industry

- Ms Jessica Tinsley
- Mr Jack Morrish

Australian Discrimination Law Experts Group

- Dr Bill Swannie
- Associate Professor Alysia Blackham
- Dr Robin Banks

Australian Lawyers Alliance

- Mr Shaun Marcus

Law Council of Australia

- Mr Greg McIntyre
- Ms Katherine Eastman
- Ms Leonie Campbell

Equality Australia

- Mr Ghassan Kassisieh

The Working Women's Centre SA Inc

- Ms Abbey Kendell
- Ms Caitlin Feehan

Kingsford Legal Centre

- Ms Emma Golledge

Human Rights Law Alliance

- Mr John Steenhof

Freedom for Faith

- Mr Mike Southon
- Mr Mark Spencer
- Bishop Michael Stead

*Australian Catholic Bishops Conference**Grata Fund and Public Interest Advocacy Centre*

- Ms Isabelle Reinecke
- Ms Courtney Law
- Ms Ellen Tilbury
- Ms Mitchell Skipsey

People with Disability Australia

- Ms Lisa Ira
- Ms Joanne Yates

Australian Human Rights Commission

- Professor Rosalind Croucher
- Dr Anna Cody
- Ms Melissa De Abreu

Attorney-General's Department

- Ms Anne Sheehan
- Ms Petra Gartmann
- Ms Claire Stephens

National Legal Aid

- Ms Katherine McKernan
- Ms Melanie Schleiger