National Legal Aid

14 April 2023

Attorney-General's Department

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

National Legal Aid (**NLA**) welcomes the review into an appropriate cost model for Commonwealth anti-discrimination laws by the Attorney-General's Department. We commend the Government for its commitment to implement all Respect@Work Report recommendations, and for taking the time to consult and carefully consider the last remaining recommendation requiring legislative action, being recommendation 25 concerning a costs protection provision for discrimination proceedings.

Legal aid commissions represent people who are among the lowest paid and in the most precarious employment in Australia. We see the real harm that discrimination and sexual harassment causes and how difficult it is for people to take any kind of action given the social, emotional and financial costs and risks involved in doing so.

NLA strongly recommends that the Australian Government adopt the Equal Access costs model in discrimination matters.

This model is the most equitable option outlined in the Consultation Paper,1 being the only option that will support all individuals to enforce their right to non-discrimination, irrespective of how much money they earn. It also recognises the public interest in supporting people to speak up about discrimination and deterring unlawful conduct.

It is our view that the equal access model has the potential to encourage people who experience the highest rates of discrimination to come forward and pursue a legal claim. This includes Aboriginal and Torres Strait Islander women, women of colour, gender diverse people, women with disability, younger women and older women.

This recommendation is informed by the experiences of our clients and lawyers, as well as engagement we have undertaken previously with stakeholders on these issues, including through the Power to Prevent coalition.

A more detailed discussion about the equal access model and our concerns about the other options proposed is set out in **Annexure 1** for your consideration.

About National Legal Aid

NLA represents the directors of the eight state and territory legal aid commissions in Australia. Legal aid commissions have extensive experience assisting victims of discrimination and sexual harassment and advocating for systemic changes to improve safety and access to justice in Australia. Our lawyers have specialist knowledge of sexual harassment and discrimination law and a strong commitment to helping people resolve their legal problems and get a fair outcome.

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[1] Australian Government Attorney-General's Department, *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws*, February 2023 (**Consultation Paper**).

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For example, over the past five years Victoria Legal Aid's (VLA) specialist discrimination law service, the Equality Law Program, has provided over 5,600 legal advice sessions regarding discrimination matters, including over 800 advice sessions about sexual harassment and sex discrimination. VLA has also played a leading role in collaborative advocacy for reforms to prevent and address sexual harassment. This includes establishing the Power to Prevent coalition, an alliance of more than 60 diverse community organisations, unions, academics, peak bodies, health professionals, lawyers and victim-survivors, to inform the Respect@Work Report and subsequent inquiries.

Legal Aid Queensland (LAQ) through its Human Rights, /Anti-Discrimination and Employment law practice provides advice assistance, and representation to Queenslanders who have experienced sexual harassment and sex discrimination in all areas of public life. LAQ has been involved in the Power to Prevent coalition and has contributed to advocacy and submissions relating to the Respect@Work report and Queensland's recent review of the Anti-Discrimination Act 1991 (Qld).

Legal Aid NSW (LANSW) provides advice and representation in discrimination and harassment matters to New South Wales residents via its specialist employment law and human rights teams, as well as lawyers in its 22 regional offices. LANSW contributes to inquiries and law reform submissions relating to discrimination and employment law and publishes self-help education resources for those experiencing discrimination and harassment such as the Discrimination Toolkit: Your Guide to Making a Discrimination Complaint.

Northern Territory Legal Aid Commission (NTLAC) provides legal advice, referral and assistance in employment and discrimination matters, including sex discrimination, throughout the Northern Territory and support the Power to Prevent Coalition. NTLAC also provided extensive submissions in the recent review of the Northern Territory's Anti-Discrimination Act 1992 (NT).

We also note that VLA, Legal Aid NSW, Legal Aid WA and Legal Aid Queensland have received funding under the National Legal Assistance Partnership 2020-25 Bilateral Schedule to provide front-line support to address workplace sexual harassment. This has allowed some of the legal aid commissions to expand in order to deliver these services. For example, Legal Aid NSW is establishing a new statewide Respect at Work Legal Service (RAWLS) to provide legal services to people experiencing workplace sexual harassment and discrimination. RAWLS solicitors will work with Legal Aid NSW employment and human rights specialist teams to provide comprehensive advice and representation services. Community engagement officers will connect clients to RAWLS and assist with promotion and community legal education activities.

We take a client-centred approach when providing legal help, which places the client's interests at the centre and is responsive to their unique experience of discrimination, including intersectional discrimination.

Thank you for the opportunity to provide feedback on this important review. We would welcome the opportunity to discuss this submission with you further.

Yours faithfully,

Louise Glanville
Chair

National Legal Aid

Annexure 1: NLA's response to the consultation paper

Recommendation

We recommend adopting an equal access costs model in federal discrimination law, which provides that:

a. An applicant with a claim under federal discrimination laws will not be liable for adverse costs except where:
   i. the applicant instituted the proceedings vexatiously or without reasonable cause; or
   ii. the applicant's unreasonable conduct caused the other party to incur the costs.[2]
   The fact that an offer of settlement is put by a respondent and then the applicant loses or succeeds but is awarded less than the offer of settlement, does not entitle the respondent to costs.
b. Where an applicant is successful, the respondent is liable to pay the applicant's costs.

Terminology

We have adopted the definitions that are contained in the Consultation Paper.

The context of legal assistance for discrimination matters

We commend the Government for investing in the legal assistance sector to expand legal services for victim-survivors of workplace sexual harassment. Discrimination and employment are complex areas of law, underpinned by public policy goals that may not be common knowledge, such as the goals of achieving both formal equality and substantive equality. It is therefore critical that people who experience discrimination have access to advice from lawyers who specialise in discrimination law.

Expert legal advice and representation can ensure that clients are well informed about their legal options, the potential risks and benefits involved, and whether the law is likely to help them achieve their desired outcomes. Without such advice individuals may miss out on legal recourse and redress, achieve poorer outcomes, be exposed to financial risks, and their disputes may be unnecessarily prolonged. Additionally, expertise in taking a trauma-informed and client-centred approach is necessary to minimise the risks of re-traumatisation and respond to unique experiences of discrimination, including intersectional discrimination.

It is equally important that discrimination law jurisprudence is informed by advocates with this expertise to encourage beneficial interpretation of the law, as intended by Parliament. In 'Mechanisms Promoting Equality in the Equal Opportunity Act',3 Dominique Allen observed that the Victorian Civil and Administrative Tribunal referred to the objects clause of the Equal Opportunity Act 2010 (Vic) in only four of the 118 cases that it decided between the Act's implementation and December 2018. Allen wrote:

[2] This wording is modelled on wording in the Fair Work Act and whistleblower protections in the Corporations Act and Public Interest Disclosure Act.

[3] Dominique Allen, "Mechanisms Promoting Equality in the *Equal Opportunity Act*", *Melbourne University Law Review* 44(2) [2020] 459, 479.

> *It is worth noting that Victoria Legal Aid represented the complainant in each of these four VCAT cases, and that it operates a specialist equality law practice. Victoria Legal Aid briefed the same barrister in three of those cases. Each was heard by a different VCAT member. This suggests that VCAT is more likely to take the objects of the Act into account when it is invited to do so by lawyers who have a degree of sympathy for, and understanding of, the nature of the Act.*[4] *(Footnotes omitted).*

Specialist discrimination law practices at legal aid commissions, community legal centres and plaintiff law firms offering no-win no-fee services are important component parts of a legal system that supports all victim-survivors of discrimination to seek redress and effect positive change. A range of options for legal representation is necessary to ensure that discrimination cases of high social value can proceed to hearing, even if the quantum of compensation is low, or at the other end of the spectrum, the person's means make them ineligible for assistance from the not-for-profit sector.

As legal aid commissions with the shared goals of responding to legal need within the community and improving access to justice and legal remedies, we consider this context important to this review. Changing the costs model for discrimination matters will have flow-on effects for the legal sector primarily firms operating on a no-win no-fee basis – by influencing the financial viability of providing assistance. For the reasons set out below, in addition to being the fairest model, it is our view that the equal access costs model has the bests prospects of increasing legal assistance to victim-survivors of discrimination and thereby increasing access to justice.

Current costs models in discrimination laws

The current approaches to awarding costs in discrimination matters in Australian federal and state jurisdictions commonly fall into two categories, with some variation as outlined in the Consultation Paper:5 costs follow the event, or the parties bear their own costs (also known as the cost neutrality models).

In our practice experience, the principle that 'costs follow the event' discourages many victim-survivors of sexual harassment and discrimination from taking legal action in the federal jurisdiction due to the risk of a large adverse costs order. Discrimination and sexual harassment cases are challenging to prove – the unlawful conduct often occurs in private, and respondents often have a 'monopoly on knowledge', including possession of relevant information and control of key witnesses.6 As such, the risk of losing can be significant. There is also an economic power imbalance between most complainants and respondents, especially in employment relationships, resulting in an uneven playing field.

A costs neutrality approach that fails to reward successful applicants with a favourable costs order also deters many applicants with meritorious claims of discrimination from seeking redress through litigation because of the significant risk that their own legal costs will be higher than any compensation

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4 Ibid.

5 Consultation Paper, 9-10.

6 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 180 and Laurence Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6 *Industrial Law Journal* 212, 213. See also Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' [2009] 31 *Sydney Law Review* 579, 583.

awarded. There are multiple examples of this happening – for example in the cases of *Tan v Xenos*[7] and *Richardson v Oracle*[8] (subsequently overturned on appeal). Given the complexity of discrimination law, pursuing a case to hearing without representation is rarely feasible.[9]

If successful applicants cannot recover their legal costs, the only people who can effectively pursue a discrimination matter to court – given the complexity of discrimination proceedings and resulting need for legal representation – are people who can obtain representation from the legal assistance sector, and people with claims that are of such high value that the compensation awarded will cover their costs.

It is important that successful applicants are awarded costs as a matter of fairness, as well as to ensure that cost-contingency arrangements are feasible. This enables people with smaller claims (i.e., under $200,000) who are not eligible for representation from the legal assistance sector to access no win-no fee representation and just outcomes in court.

Notably, a number of community legal centres and legal aid commissions have recently been funded to increase the legal assistance provided to victim-survivors of sexual harassment and workplace discrimination. This means that more people can now pursue such claims with less fear about being able to cover their legal costs.[10] Nonetheless, given the high incidence of sexual harassment and the fact that funding for assistance for other discrimination claims has not increased for all legal assistance providers, this is likely to be a small proportion of overall claims. Further, people with high value claims are still unfairly shouldering the cost of enforcing discrimination laws and often taking a significant financial risk.

The challenges with the current costs models described above overlay multiple additional barriers to making a legal claim faced by people who experience discrimination and sexual harassment, not least of which are the emotional and social costs and time-consuming nature of discrimination litigation. In our practice experience, clients will regularly decide to end a strong claim of discrimination – either by withdrawing a complaint or accepting a low amount of settlement – because the legal process is so mentally demanding and prolonged, and they just want to move on in their life. As Blackham states, in the current cultural and legislative context:

> *Individual claiming is likely to be a rare response: it requires a perfect confluence of individual, contextual, and structural factors for an individual to name, blame and claim, and then pursue their complaint….In practice, individual enforcement is likely to be the exception, not the norm.*[11]

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7 *Tan v Xenos* [2008] VCAT 1273.

8 *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102.

9 Margaret Thornton, Kieran Pender, Madeleine Castles, Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study | Attorney-General's Department (November 2022), 99.

10 Notably, this is still a consideration for some legally aided clients who may be required to make a financial contribution to the costs of their matter.

11 Alysia Blackham, *Reforming Age Discrimination Law* (2022), 74-5, citing also Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 Modern Law Review 733, 735; and Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990), 83

As a result, rights are rarely enforced and when they are it is almost always done in private, on a confidential basis, rather than in public proceedings.[12] This 'privatised enforcement' of discrimination law encourages individual solutions rather than societal change.[13] While the newly introduced positive duty will help to address this problem it is not a panacea, as illustrated below.

Consequences of restricting access to justice for discrimination

When applicants are unfairly deterred from pursuing their claims in court, they are denied access to justice. This also contributes to a lack of judicial determination of discrimination cases, resulting in a lack of precedent to aid in understanding and application of the law.

The lack of discrimination case law has considerable negative flow-on effects including, as noted in the Consultation Paper, low levels of judicial specialisation in discrimination matters14 and jurisprudence that is often inconsistent,15 which in turn leads to less certainty for applicants about the likely outcome at hearing, and conservative legal advice due to the risks involved.16 As Blackham states, "practitioners who are unfamiliar with equality law may look at the number of cases that are dismissed and conclude that cases never succeed in this jurisdiction."[17]

This results in discrimination laws being underutilised and failing to fulfil their purpose of eliminating discrimination and promoting recognition and acceptance within the community of principles of equality.[18]

Equal access costs model

Implementing an equal access costs model would counter the deterrent effect of the current costs rule. An equal access costs model seeks to level the playing field for applicants by overcoming some of the significant challenges they face – namely, the risk of an adverse costs order and the risk that the amount of compensation received will be insufficient to cover legal costs, even if they are successful at hearing. In NLA's view, it is a more fair and equitable approach to costs in discrimination matters.

Promoting access to justice for people who have experienced discrimination would result in improved enforcement, accountability, jurisprudence and public understanding of rights and obligations under discrimination law. In this way, an equal access costs model would also ensure that the new protections in the Sex Discrimination Act can be more meaningfully accessed and realised.

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12 Blackham, above n 11 38.

13 Ibid, 38.

14 Consultation Paper, 11. See also, Margaret Thornton, Kieran Pender, Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study | Attorney-General's Department* (November 2022), 98-99, noting that a theme of their qualitative research was an absence of specialisation by those hearing and determining discrimination claims. Free and Equal, 103, also reports that there is a lack of judicial elaboration of discrimination law resulting from the low number of cases.

15 See, for example, *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 and People with Disabilities Australia, *Media Release: Reforming the Disability Discrimination Act following the Sklavos decision* (10 May 2021).

16 Consultation paper, 11, referring to Australian Human Rights Commission, Free and Equal: A reform agenda for federal discrimination laws (Report, December 2021) 191 ('Free and Equal Paper'), 191. See also Blackham, above n 11 161.

17 Blackham, above n 11 161.

18 See, for example, the objects of the *Sex Discrimination Act 1984* (Cth), s3.

Recent polling commissioned by Australian National University shows that a majority of people in our community support this costs model, believing that "claimants should be protected from liability for their employer's legal fees in sexual harassment litigation, whatever the outcome."19

An equal access costs model ensures that:

- People who experience discrimination and sexual harassment are supported to come forward without the risk of becoming bankrupt or having a huge debt simply for enforcing their rights
- Applicants are able to obtain legal representation on a no win-no fee basis, as solicitors and barristers can still recover their costs where a case is successful
- It is financially viable to pursue even small financial claims, and possible to do so with legal representation, ensuring that workers who are low-paid and in precarious employment enjoy the same rights as high-paid workers with larger claims, and
- Respondents that contravene discrimination laws are required to contribute to the cost of enforcing those laws, rather than burdening the individuals who experience discrimination with this cost.

By removing a significant barrier to litigation for people with legitimate complaints of unlawful discrimination, the equal access costs model assists not only individual victim-survivors, it also serves the public interest by promoting more public accountability for contraventions of discrimination law and disincentivising unlawful conduct.

An equal access costs model will mean that more discrimination claims have a chance of proceeding to hearing, including well-founded claims that involve serious contraventions that are currently not being exposed – such as Zainab's case discussed below. Such cases send an important message to duty-holders and individuals alike that discrimination is unacceptable, there are consequences for contraventions and victim-survivors of discrimination and sexual harassment can obtain fair redress for the harm and loss they suffer.

Zainab's story

Zainab (not her real name) is Muslim and wears a hijab. She was employed in a precarious and low-paid role as an entry level clerical employee. She was told that she would be employed for 3 months as a casual before being "transferred" to a part-time role. During this time, she was paid less than the minimum Award rate for the work she performed.

She was fired less than a week after making a complaint about Islamophobic comments made by a co-worker. When she complained about it, her employer said that the colleague who had made the comments "wasn't racist", told her that she "wouldn't be here" if the employer was racist, and went on to make a number of further discriminatory comments about Muslims and people of other races and religions.

With the support of Victoria Legal Aid and her partner, Zainab lodged a claim against her former employer. She was severely affected by the conduct, and it resulted in her needing to re-engage with

[19] Margaret Thornton, Kieran Pender, Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study | Attorney-General's Department* (November 2022), 28.

psychological treatment. She described feeling frightened to apply for in-person and customer facing roles because she felt that people would judge her for her religion.

However, because Zainab was employed casually, paid less than the Award minimum, and had only been employed for a short time, her economic loss was extremely limited. Despite having a strong discrimination case, she decided to accept a low settlement offer. As a low-paid, casual worker, Zainab decided that it was not worth pursuing her claim through a lengthy and costly litigation process.

Meru's story

Meru was employed on a construction crew. Meru was paid $29 per hour. Meru and Rob were paired and performed tasks together. Rob and Meru shared some personal details as they were getting to know each other. After a few weeks, Rob began sharing increasingly personal details with Meru. Rob told Meru that he hadn't had sex with his wife for a long time and he regularly visited prostitutes. Meru asked Rob not share these details with her. Rob would tell Meru that she had beautiful eyes and asked to kiss her. Several weeks after Meru began work, Rob asked to look at her engagement ring. Meru put her hand out to show Rob the ring and Rob placed Meru's hand in his coat pocket and onto his erect penis. Meru complained to management about Rob's behaviour. After making the complaint of sexual harassment, Meru was no longer rostered at the site where she worked with Rob. Meru was offered work on one or two occasions after making the complaint but she was unable to undertake those shifts. Meru made a sexual harassment complaint to the Australian Human Rights Commission. Neither Rob or the employer made an offer of settlement and Meru's complaint was not resolved. Meru did not pursue her complaint further, in part because of concerns about the risk of an adverse costs order.

Addressing concerns with the equal access model

The Consultation Paper notes potential disadvantages with the equal access model, which we consider below.

1. A respondent may be unable to afford legal representation

The Consultation Paper states that the equal access costs model may prevent respondents from obtaining legal representation on a costs conditional basis.[20] We are unaware of the legal profession entering into 'no-win, no-fee' arrangements with respondents in discrimination matters. While such arrangements may exist, we do not believe that this practice is widespread. The financial risks for the legal representative would be significant given that legal costs in discrimination matters can be high, matters are often complex and prolonged, applicants are almost always individuals and it is difficult to determine whether an individual will have the means to pay a costs order.

[20] Consultation Paper, 29.

Concerns have also been expressed about the financial burden on respondents, particularly smaller respondents, that have to pay for their legal costs even if they are successful. (This is also a feature of the neutrality options, so this concern is only relevant if a 'costs follow the event' model is retained.)

Insurance is available to organisations and some individuals (for example, in their capacity as a company director or officer) to cover the cost of legal fees in discrimination claims. If a company cannot afford the cost of obtaining this insurance then it is unlikely that suing that company will make financial sense in any event. Further, companies can claim the cost of their legal fees as a tax deduction.

2. Unmeritorious discrimination complaints may increase

Unmeritorious complaints will be discouraged by the risk of an adverse costs order if the complainant has acted vexatiously or unreasonably in commencing the proceedings or in the way they have conducted themselves in the proceeding.[21] If the complaint has sufficient merit to be considered reasonable, then it is appropriate to have the option of having it considered by a court. This is one of the goals of this model – to encourage more people who have experienced discrimination to take action and create greater accountability and case law. While there may be outlying cases where someone succeeds but the case is close or the result seems unfair, this is a feature of our legal system. These rare outliers should not stop the introduction of a costs model that would advance equity and fairness overall.[22]

As the Consultation Paper states, the number of discrimination claims that proceed to court is extremely low (on average less than 3 per cent of finalised complaints).[23] The number that proceed to hearing is even lower. As a result, the risk of an increase of unmeritorious claims in real numbers is very low.

In addition, there is the significant time, work and emotional energy demanded by litigation, which has the general effect of deterring most people from pursuing a discrimination claim to court, meritorious or not.

Calderbank offers

We are concerned that the costs risk presented by Calderbank offers could negate the benefits of an equal access model by having a chilling effect on litigation. We acknowledge that Calderbank offers are an important mechanism to limit the time and cost of litigation – both private and public – but it is also important to acknowledge that discrimination claims are not commercial in nature; they are claims about human rights. Applying a rule that focusses on financial outcomes is not appropriate in

[21] Consultation Paper, 28.

[22] In Thomas D Rowe, 'The Legal Theory of Attorney Fee Shifting: A Critical Overview' *Duke Law Journal* (1982) 651 Rowe notes that if the reasons behind a fee shifting policy are general deterrence to promote equity by ensuring that successful applicants are compensated for their legal costs then concern about avoiding injustice in individual cases is difficult to justify. Rowe states that "if equity to a prevailing party through make-whole compensation underlies a particular fee shifting rule, the grounds for being troubled by close-case difficulty disappear…a fee award in a close case should create no more discomfort than the rest of a damage award…Once granted make-whole relief, a party should get *full* compensation whether the initial decision seems easy or hard." Rowe notes that there may be different considerations if the rationale is to promote test litigation, because it is then important that neither side is deterred by the threat of adverse fee shifting: 670-671.

[23] Consultation Paper, 15, citing Free and Equal, 103.

circumstances where the litigation goals will often include restoring dignity and respect and achieving public vindication and systemic change. It also undermines the goals of an equal access costs model, which include to disincentivise unlawful conduct and increase understanding of discrimination law by encouraging more jurisprudence.

A strong example of this is the case of *Richardson v Oracle Corporation Australia Pty Limited (No 2)*[24] at first instance, in which Ms Richardson was required to pay the legal costs of the respondents on an indemnity basis from the time that a Calderbank offer was made because it was higher than her damages award. This was in addition to her own legal costs of $244,465.80. While this decision was subsequently overturned on appeal, it demonstrates the significant risk that a traditional approach to Calderbank offers and costs can pose in discrimination cases.

For this reason, it is NLA's view that the mere fact that an offer of settlement is put by a respondent and then the applicant loses, or succeeds but is awarded less than the offer of settlement, does not entitle the respondent to costs.

International examples of the equal access costs model

As noted in the Consultation Paper, the equal access costs model is already in use in Australia for cases involving whistleblowers.[25] There are also some notable examples of the equal access costs model being used in discrimination law jurisdictions outside of Australia.

The Council of the European Union is presently considering adopting a costs shifting approach in a directive of the European Parliament and Council to strengthen gender pay equity and prohibit discrimination through pay transparency and enforcement mechanisms. Proposed EU Directive 15997/22 provides that in pay discrimination cases the claimant shall not have to bear their own costs where they have reasonable grounds for bringing the claim,[26] recognising that litigation costs create a serious disincentive for victims which leads to '*insufficient protection and enforcement of the right to equal pay*'.[27]

As the Consultation Paper states, the equal access costs model has been applied in employment discrimination cases in the US since 1978.[28] There is a substantial body of US federal case law recognising that an applicant seeking to enforce their civil rights should not bear the costs burden of doing so.[29]

The equal access model applies in all employment discrimination cases under the US Civil Rights Act unless special circumstances render an award of costs to a successful applicant unjust, though special circumstances are to be narrowly construed.[30] A successful defendant may only seek costs where the

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[24] [2013] FCA 359.

[25] See section 18 of the *Public Interest Disclosure Act 2013* and section 1317AH of the *Corporations Act 2001,* referred to in the Consultation Paper, 28 and extracted in full in the appendix.

[26] Council of the European Union, Interinstitutional File 2021/0050 COD, 15997/22 ADD 1, REV 2, Article 19 Legal and Judicial Costs.

[27] Council of the European Union, Interinstitutional File 2021/0050 COD, 15997/22 ADD 1, REV 2, (41), 20 December 2022.

[28] Consultation Paper, 21; *Civil Rights Act of 1991,* section 323(3)(e).

[29] See, for example, *Christiansburg Garment Co v EEOC* 434 US 412 (1978). *New York Gaslight Club Inc. v Carey*, 447 U.S. 54 (1980), *Newman v. Piggie Park Enterprises,* 390 US 400, 390 US 402.

[30] US Equal Employment Opportunity Commission, *Management Directive 110* (August 2015) ch 11, VI, (C.) https://www.eeoc.gov/federal-sector/management-directive/chapter-11-remedies; 29 C.F.R. § 1614.501(e)(1)(i); *New*

applicant's claim was frivolous, vexatious or without merit.[31] A number of states, including California, have also adopted the equal access costs model in employment discrimination cases.[32]

The US Fair Labor Standards Act also includes an equal access costs model. One way fee shifting in this context has been seen as tool used by Congress to incentivise the private enforcement of workers' rights to vindicate important societal interests.[33]

Other options proposed

Costs neutrality models

It is our view that the costs neutrality models outlined in the Consultation Paper will limit access to legal representation, fail to increase access to justice or public interest litigation, and that the soft costs neutrality model will result in uncertainty about the costs outcome for parties. These outcomes are discussed in further detail below.

Limited access to legal representation

In most cases, both the hard and soft neutrality costs models will make cost conditional fee arrangements untenable.[34]

In respect to employment-related claims, people on low incomes and in casual or other forms of precarious employment – such as Zainab – are particularly disadvantaged by cost neutrality models because their financial claims are generally smaller (because their economic loss is lower) and much less likely to justify the cost of litigation. Therefore under these models it is both cheaper to discriminate against lower paid workers and easier to get away with it.

The amount of damages awarded in non-employment-related claims is often significantly lower than in employment-related claims, although the issues being litigated are no less important to the individual or the public.[35] The inability to recover legal costs in such cases is therefore likely to be a particularly strong barrier to obtaining legal representation and deter the pursuit of legal claims.

No increase in public interest pro bono litigation

York Gaslight Club, Inc v Carey, 447 US 54 (1983); *Thomas v Department of State*, EEOC Appeal No. 01932717 (June 10, 1994).

[31] *Christiansburg Garment Co v EEOC* 434 US 412 (1978).On the interpretation of 'prevailing party' see HA Zionts, *'The Civil Rights Attorney's Fees Awards Act of 1976: A View from the Second Circuit'* (29) *Buffalo Law Review* 3(1980), 565-566.

[32] California's Fair Employment and Housing Act, Government Code s12940 (FEHA) prohibits harassment based on a protected category against workers in all workplaces, irrespective of the number of employees. Harassers may also be held personally liable. Employment discrimination by employers with 5 or more employees is also prohibited. Both punitive and compensatory damages (uncapped) can be awarded under the FEHA.
The equal access costs model has applied to discrimination and harassment proceedings under the FEHA since 2015: *Williams v Chino Valley Independent Fire District* (2015) 61 Cal.4th 97. The case of *Lopez v Routt* (2017) 17 Cal.App.5th 1006 confirmed that the equal access costs model applies to individual defendants as well as employer defendants.

[33] Bassina Farbenblum and Laurie Berg, *Migrant Workers' Access to Justice for Wage Theft: A global study of promising initiatives,* (Migrant Justice Institute, 2021), 31; Fair Labour Standards Act of 1938, 19 USC §216(b).

[34] See, eg, Free and Equal, 200.

[35] See, for example, *Eatock v Bolt* FCA 1103.

In addition, it is our view that neither the hard nor soft neutrality models will result in any significant increase in public interest pro bono litigation. The Consultation Paper noted there may be an increase due to the near certainty that an applicant will not face an adverse costs order. However, most Australian states and territories have a soft costs neutrality model for dealing with costs in discrimination matters before tribunals, so most complainants already have the option of bringing a claim in a jurisdiction where they will not be subject to an adverse costs order.

Despite this, the number of discrimination matters that proceed to hearing in all jurisdictions is low.[36] This includes in Victoria, where the *Equal Opportunity Act 2010* (Vic) is modern and generally beneficial legislation and the amount of damages awarded in discrimination cases by the Victorian Civil and Administrative Tribunal is comparable to the amounts awarded in the Federal jurisdiction.[37]

Uncertainty regarding the exercise of judicial discretion

Although the soft costs neutrality model provides courts with discretion to order costs, it is unclear whether courts will order that unsuccessful respondents pay costs, even in circumstances where the amount of compensation awarded to a wholly successful applicant is less than their legal costs. Further, there is increased uncertainty about whether the applicant will be subject to an adverse costs order. We do not consider that this model will provide applicants with the level of certainty required to negate the deterrent effect of these risks. Even a small risk of having to pay hundreds of thousands of dollars in legal fees is very off-putting.

While the Consultation Paper notes that "a criterion could be included directing courts to consider the award of damages in a particular case, so as to factor this into any costs order",[38] there is no guarantee that a court would award costs to a successful applicant.

We consider that a soft cost neutrality model would need to be very prescriptive, and significantly more prescriptive than that proposed in the *Free and Equal Report* and the versions contained in the Consultation Paper if it is to fulfil the goal of increasing access to justice for people who have experienced discrimination. In our view, a high level of certainty is required about the fact that a costs order will be made in an applicant's favour if successful, and will not be made against them if not, if it is to achieve this goal rather than deterring people from making a claim. It is difficult to see how anything less than what is proposed in the equal access model could achieve this.

Applicant choice model

As noted in the Consultation Paper, the 'applicant choice model' shares the same disadvantages of the hard and soft cost neutrality approaches.

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[36] Margaret Thornton, Kieran Pender, Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study | Attorney-General's Department* (November 2022), 28. This study identified a total of 1,141 cases in relation to age, sex, disability, race and sexual harassment across the State and Territory jurisdictions from 1984 to the end of 2021, being an average of 31 such cases per year across these jurisdictions.

[37] Ibid, 28. Research by Thornton et al shows that the average number of age, race, disability and sex discrimination and sexual harassment cases in Victoria each year is about 8-9. In 2021 the number of cases in Victoria was 17. These related to sexual harassment and discrimination on the grounds of sex, race, disability and age, with 11 being disability discrimination cases.

[38] Consultation Paper, 30.

As mentioned above, most complainants already have a choice between a costs neutrality option (state/territory jurisdictions) and a costs follow the event option (federal jurisdiction), so the value of this model is limited.

Most significantly, the applicant choice model does not encourage people to pursue complaints of discrimination if the damages that can be claimed are low. Under a costs neutrality model the damages awarded in such claims are likely to be significantly less than the legal costs, and under a costs follow the event model there remains the risk of a substantial adverse costs order. The exception is a small claim that is so strong that a favourable costs award is certain, but such matters inevitably settle in any event.

As already stated, this disadvantages workers with employment discrimination claims who are lower paid and in precarious employment. This group of workers also experience discrimination and sexual harassment at higher rates.[39] Other groups who experience discrimination at disproportionately high rates are also unfairly disadvantaged; they should not bear the financial risks and costs of enforcing discrimination laws and their right to equality.

The practical application of an applicant choice model is also problematic. It is a difficult choice for applicants to have to make and they may not be fully aware of the risks involved when making it, particularly if they are unrepresented or they do not have all relevant information available to them.

Recommendation

We recommend adopting an equal access costs model in federal discrimination law, which provides that:

a. An applicant with a claim under federal discrimination laws will not be liable for adverse costs except where:
    i. the applicant instituted the proceedings vexatiously or without reasonable cause; or
    ii. the applicant's unreasonable conduct caused the other party to incur the costs.[40]
    The fact that an offer of settlement is put by a respondent and then the applicant loses, or succeeds but is awarded less than the offer of settlement, does not entitle the respondent to costs.
b. Where an applicant is successful, the respondent is liable to pay the applicant's costs.

[39] See, for example, Respect@Work Report, 167.
[40] This wording is modelled on wording in the Fair Work Act and whistleblower protections in the Corporations Act and Public Interest Disclosure Act.