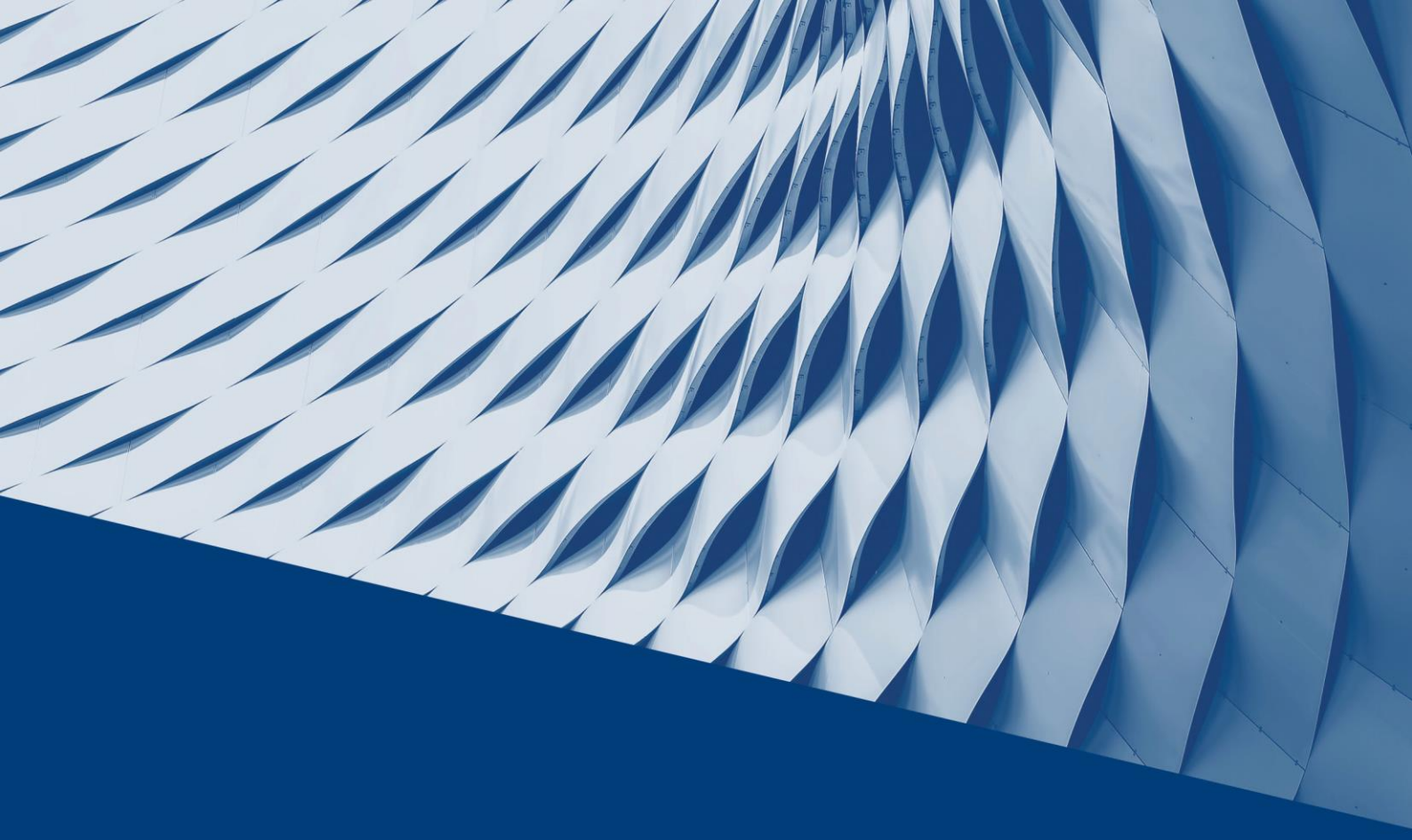

Costs Protection Bill 2023

ACTU Submission to the Senate Legal and Constitutional Affairs Committee on the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

ACTU Submission, 9 January 2024
ACTU D. No 01/2024

ACTU
australian council of trade unions

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Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Reflecting the diversity of the Australian workforce, the union movement includes people from all backgrounds and walks of life, including young people, members of the LGBTIQ+ community, First Nations workers, people with disability, and workers from religiously, culturally and linguistically diverse backgrounds. Over 50% of Australian union members are women. Australian unions have a long and proud history of fighting for workplaces free from racism, sexism and all forms of discrimination and prejudice, and standing up for justice, safety, respect and equality for all workers.

The Australian union movement has a significant interest in the effectiveness of Australia's anti-discrimination and human rights framework. Since the commencement of anti-discrimination laws, the majority of complaints have related to employment.[1] This is because work is absolutely central to human dignity and our ability to live a decent life. The significant power imbalance between employers and workers means that workers are particularly vulnerable to exploitation, discrimination and other human rights abuses. In particular, the Australian union movement made a significant contribution to the National Inquiry into Sexual Harassment in Australian Workplaces and has advocated for the implementation of all 55 recommendations of the Respect@Work Report since it was published in 2020.

[1] Australian Human Rights Commission 2022-23 Complaint statistics) show that in 2022-23, employment made up 34% of complaints under the *Disability Discrimination Act*; 78% of complaints under the *Sex Discrimination Act*; 36% of complaints under the *Racial Discrimination Act* and 62.5% of complaints under the *Age Discrimination Act.*

Background

The ACTU welcomes the opportunity to make a submission on the *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* (**the Bill**) to the Senate Legal and Constitutional Affairs Committee. The Bill implements the final legislative recommendation arising out of the Respect@Work Report (Recommendation 25).

The Bill is the result of an extensive consultation process undertaken by the Government over the last 12 months, and we commend it on a very thorough and considered process. Costs provisions initially included in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect@Work) Bill 2022* (**Respect@Work Bill**) were removed in response to significant concerns about the proposed 'soft costs neutrality' model raised by many, including the community legal sector, legal professionals, unions, academics and others. The matter was subsequently referred by the Government to the Attorney-General's Department for a review into an appropriate cost model for Commonwealth anti-discrimination laws (**the Review)**, resulting in the publication of the *Consultation Paper: Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws* (February 2023) **(the Consultation Paper).** Organisations were invited to make submissions to the Review, which have been published.[2] The Department also held multiple consultation roundtables with a wide range of organisations. Following the consultation process, the Government introduced the Bill to the House of Representatives on 15 November 2023. The costs provisions in the Bill are a significant positive advance on the costs provision initially included in the Respect@Work Bill.

During the consultation process, the equal access model emerged as the model that would best achieve the policy objectives of Recommendation 25 and the Respect@Work Report. It was widely seen as being superior to the soft and hard costs neutrality models that had previously been proposed. The Power to Prevent Coalition (a diverse group of community organisations, unions, academics, peak bodies, health professionals, lawyers and victim-survivors) advocated for this reform, with 85 organisations endorsing a call for an equal access costs model in discrimination and sexual harassment matters.[3] This represents broad support across the sector for this model. Submissions to the Review also demonstrated strongly held and consistent views

[2] Those submissions are available online - Published responses for Review into an appropriate cost model for Commonwealth anti-discrimination laws - Attorney-General's Department - Citizen Space (ag.gov.au)
[3] Response 421918623 to Review into an appropriate cost model for Commonwealth anti-discrimination laws - Attorney-General's Department - Citizen Space (ag.gov.au)

that an equal access costs model would best achieve the policy objectives of the Respect@Work Report.

The ACTU welcomes and supports the Bill, which implements a modified Equal Access costs model in federal anti-discrimination law in Australia, addressing a key barrier to people pursuing redress for discrimination and sexual harassment. This will mean that individuals who bring claims of discrimination and sexual harassment can recoup their legal costs if they are successful while being protected from having to pay legal costs if they are unsuccessful (except in limited circumstances). Legal costs in these types of cases can easily be in the hundreds of thousands of dollars and can cause severe financial hardship including bankruptcy – a major barrier to people speaking up when they are harmed by discrimination or sexual harassment.

The ACTU further notes our support for the Power to Prevent Coalition's submission to the Committee regarding this reform, which welcomes the Bill and the adoption of key principles of the Equal Access model.

Importantly, this reform will:

- Remove financial barriers that prevent victims of discrimination and sexual harassment from seeking justice,
- Greatly enhance access to justice for people who have experienced discrimination and harassment,
- Ensure applicants can access legal representation and are able to come forward without the risk of becoming bankrupt or facing significant debt simply for enforcing their rights,
- Lead to more judicial consideration of anti-discrimination laws, send a clear message that this behaviour is unacceptable, and allow damages awards to better reflect community standards,
- Reflect the public interest in holding people to account for discrimination and harassment,
- Overcome the deterrent effect that an adverse costs order poses to applicants, and
- Address the power imbalances and resource disparities present in most unlawful discrimination proceedings.

We have recommendations regarding a few technical matters which we believe would strengthen the Bill further and ensure that its aims are not undermined in practice. The ACTU supports the Bill and we urge the Committee to recommend its passage.

Summary of ACTU Recommendations

Recommendation 1 – the Bill be amended so that successful respondents may be liable for costs incurred by applicants as a result of the respondent's unreasonable act or omission.

Recommendation 2 – the Explanatory Memorandum should make clear that guidance in relation to an unreasonable act or omission contained at paragraph 13 applies to both s46PSA(4) and s46PSA(6).

Recommendation 3 – amend the Bill to expressly exclude the consideration of formal and informal settlement offers (including Calderbank offers and offers of compromise) in relation to any discretion to award costs against an applicant.

Recommendation 4 – The exception contained in s46PSA(6)(c) should be removed from the Bill.

The Equal Access Model is the most appropriate model

Context – sexual harassment is endemic, yet the number of complaints remains very low

Discrimination and sexual harassment are still widespread and pervasive in Australia. One in five Australians have experienced workplace sexual harassment over the last 12 months, with one in three reporting workplace sexual harassment over the last five years.[4] 77% of Australians aged 15 and over have been sexually harassed at some point in their lifetime.[5] Yet only 18% of people who experience sexual harassment at work made a formal report or complaint.[6] On average, less than 3% of all finalised discrimination complaints proceed to a court application, and the number that proceed to final determination is even lower.[7] For sexual harassment complaints, 3% are resolved in court.[8]

[4] Australian Human Rights Commission, Time for respect: Fifth national survey on sexual harassment in Australian Workplaces (Report, November 2022) ('Fifth National Survey') at pages 12, 49.
[5] Ibid at page 12.
[6] Ibid at page 15.
[7] Attorney General's Department (February 2023) Consultation Paper: Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws ('Consultation Paper') at page 15; Australian Human Rights Commission (December 2021) Free and Equal: A reform agenda for federal discrimination laws ('Free and Equal Position Paper') at page 103.
[8] Fifth National Survey (above n 4) at page 139.

Recent research into damages and costs in sexual harassment litigation commissioned by the Attorney-General's Department and conducted by the ANU[9] (**ANU Report**) also found that the number of cases pursued in court has been decreasing steadily since 1986.[10] The ANU Report identified a total of 193 cases concerning sexual harassment that have been brought in the federal courts since 1984 (when the *Sex Discrimination Act 1984* was enacted), with damages being awarded in 95 of those cases.[11] At the State and Territory level, the research identified a total of 251 sexual harassment cases since 1984, with damages being awarded in 131 of those.[12] These figures demonstrate just how difficult it is for people who have experienced sexual harassment to get access to justice.

Issues with the current costs framework

Current costs provisions[13] provide the courts with broad discretion to award costs as they see fit, and generally follow the practice that costs are awarded after the event according to who was successful ('costs follow the event'). As part of their broad discretion, the courts can also issue a no costs order which means that costs are not to be awarded, leaving each party to bear their own costs.

In discrimination matters, it is most common for the courts to either make no costs orders (meaning each party bears their own costs), or to award costs to the successful party (meaning the unsuccessful party is required to pay the costs of the other party, as well as their own).[14]

The ANU Report found that across federal discrimination proceedings, whilst no costs orders are the most common order regardless of outcome, the number of costs orders made against applicants has increased over time, and fewer costs orders are made against respondents.[15] These trends are particularly evident in sexual harassment matters, where applicants have been ordered to pay the respondents costs in 56% of cases where the applicant was unsuccessful and in 10% of cases where the applicant was successful.[16] Compounding these trends, since

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[9] Margaret Thornton, Kieran Pender and Madeleine Castles (25 March 2022) Damages and Costs in Sexual Harassment Litigation ('ANU Report').
[10] Ibid at page 20, 42.
[11] Ibid at pages 9-10, 18, 28.
[12] Ibid at page 10. The researchers identified and analysed all sexual harassment cases ever brought in Australia under Federal State and Territory laws in the period since 1984 when the Sex Discrimination Act 1984 was enacted, to the end of 2021 – see ANU report at page 18.
[13] Section 46PO of the *Australian Human Rights Commission Act 1986* (Cth) refers to s43 of the *Federal Court of Australia Act 1976* (Cth) and s214 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth).
[14] Attorney General's Department (February 2023) Consultation Paper: Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws ('Consultation Paper') at page 10.
[15] ANU Report (above at n 9) at page 39.
[16] Ibid at pages 34-38; 42.

discrimination proceedings have moved to the federal courts, costs orders have increased significantly.[17] The ANU report also found that the number of cases proceeding to court for all types of discrimination at the federal level are declining.[18]

The advantage of the current costs model is that when applicants are successful, their legal costs are often covered by respondents. The disadvantage is that when applicants are unsuccessful, they become liable for the legal costs of respondents. As has been well established, the risk of an adverse costs order is a strong deterrent to applicants seeking redress for discrimination and sexual harassment,[19] particularly given there is often an economic power imbalance between applicants and respondents. Exacerbating this is the risk that any damages a successful applicant may be awarded may not be enough to cover their own legal costs (given the low level of damages and the high level of costs). The current costs model also has the following disadvantages:

- There is a lack of certainty for applicants as to how costs will be awarded – if successful, there is no guarantee that their costs will be covered, and they may still end up being liable for the respondent's costs.
- There is a significant risk of paying the costs of the respondent where an applicant is unsuccessful.
- It deters applicants from initiating civil proceedings, and acts as a disincentive to pursuing litigation, even if they have a strong claim.
- It favours parties with more resources, creating imbalances between parties and access to justice issues for marginalised communities.
- It perpetuates limited jurisprudence in this area which has resulted in a lack of development of legal precedent and decisions[20] that may encourage systemic change to workplace cultures.
- There is also a lost opportunity for the development of judicial expertise and specialisation, and to revisit the appropriate level of damages, keeping damages awards low.

[17] Ibid at page 42
[18] Ibid at page 27.
[19] Australian Human Rights Commission (2020) Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces, ('Respect@Work Report') at page 507; Productivity Commission Report (2004) Review of the Disability Discrimination Act 1992 at pages 58, 136, 368-369; Senate Standing Committee on Legal and Constitutional Affairs Report (2008) Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality at pages 72-73, 84-85 and 156 ; Australian Human Rights Commission (December 2021) Free and Equal: A reform agenda for federal discrimination laws, at pages 191-194; Legal and Constitutional Legislation Committee (June 1997) Human Rights Legislation Amendment Bill 1996 at [4.40]–[4.42]; Australian Government Attorney-General's Department (November 2012) Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes, at 94.
[20] ANU Report (above n 9) at page 80.

- This limited jurisprudence makes advising applicants on the merits of their claim difficult and adds to a lack of certainty for applicants as to their prospects of success.[21]

These were among the reasons that the Australian Human Rights Commission recommended moving to a "hard costs neutrality" model in the Respect@Work Report and subsequently recommended moving to a "soft costs neutrality" model in Free and Equal: A reform agenda for federal discrimination laws (**Free and Equal Position Paper**).

Issues with hard and soft costs neutrality models

The advantage of the costs neutrality models is that unsuccessful applicants are largely protected from paying the legal costs of respondents, subject to some exceptions (e.g. in the case of hard costs neutrality, applicants will be liable to pay costs if their claim is made vexatiously or without reasonable cause, or there has been an unreasonable act or omission.) The disadvantage is that successful applicants are generally unable to recoup their legal costs from respondents, unless there are particular circumstances that apply (such as a respondent's unreasonable act or omission which caused them to incur costs under the hard costs neutrality model, or a court's broad discretion to order costs to an applicant in reference to a specific list of factors under the soft costs neutrality model).

In practice, this is also a significant deterrent to applicants seeking redress, as regardless of the outcome they will likely need to pay their own legal costs, which can be prohibitive, and often their legal costs will be equal to or greater than the compensation awarded, leaving them out of pocket and nullifying their damages.[22] The unfortunate reality is that the failure to allow successful applicants to recoup their costs has the opposite effect than what was intended by Recommendation 25 of the Respect@Work report, by acting as a deterrent to applicants.[23]

Under these models, applicants are far more unlikely to be able to secure pro bono assistance or assistance from private solicitors on a 'no win, no fee' basis, avenues which provide many applicants with access to claims that they could not otherwise afford to bring. This is because it would not be financially viable for pro bono and no win no fee legal practices to act for applicants, given the high risk of costs exceeding damages.[24] This would mean many people are

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[21] Australian Human Rights Commission (December 2021) Free and Equal: A reform agenda for federal discrimination laws ('Free and Equal Position Paper') at page 191.
[22] ANU Report (above at n 9) at page 15.
[23] Ibid at page 99.
[24] ANU Report (above at n 9) at page 15; Grata Fund (2022) *The Impossible Choice: losing the family home or pursuing justice – the cost of litigation in Australia* 2<https://www.gratafund.org.au/adverse_costs_report> at pages 28-29.

left without any recourse, as they will not be able to afford legal representation without such arrangements, preventing access to justice.[25] This would disincentivise and have a dampening effect on public interest litigation, important test cases and representative actions.[26] Given the significant costs involved in Federal Court litigation, the capacity for other organisations that represent applicants, such as unions, is also limited where they are not able to recover the legal costs associated with proceedings.

Another disadvantage of these models is that they can lead to a rise in well-resourced respondents engaging in delaying tactics that increase the legal costs of the applicant and therefore limit their ability to continue proceedings. Unless respondents are 'on the hook' for costs, they are incentivised to engage in such tactics to put pressure on applicants to settle or discontinue the proceedings. Respondents can also pursue effective strategies to obtain costs orders, including through the well timed and cynical use of settlement offers.[27]

As can be seen from the above, taking a costs neutrality approach to a relationship that is characterised by endemic inequality only serves to entrench that inequality.

Equal access model

The equal access model is designed to help overcome the many barriers applicants face when bringing discrimination matters. Given the structural inequities, and disparities in power and resources, this costs model seeks to level the playing field to some degree for applicants.[28]

Under this model, the following general principles apply:

- if an applicant is unsuccessful, each party would bear their own costs, unless the unreasonable conduct of the respondent caused the applicant to incur costs;
- if the applicant is successful, the respondent would be liable for the applicant's costs;
- a court would be prevented from ordering an applicant to pay the respondent's costs except in limited circumstances, such as where the litigation was vexatious, or where their unreasonable conduct in the course of proceedings caused the respondent to incur costs.

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[25] Grata Fund (2022) *The Impossible Choice: losing the family home or pursuing justice – the cost of litigation in Australia* 2<https://www.gratafund.org.au/adverse_costs_report> at page 32.
[26] Ibid.
[27] ANU Report (above n 9) at page 91.
[28] Consultation Paper (above at n 14) at page 28.

The rationale is that where a court has found a respondent has engaged in unlawful conduct in breach of the relevant Act, the respondent should be liable to pay the applicant's costs because respondents should not be excused from paying costs where they have been found by a court to have breached anti-discrimination law. This would provide an additional incentive to not discriminate and an element of punitive action against respondents who have breached the law.

The equal access model has been adopted in different jurisdictions both internationally and domestically. One international example is the approach to costs taken in civil rights and discrimination cases in the United States, where the equal access model has been applied in employment discrimination cases since 1978.[29] The US Supreme Court has held that there are at least two strong equitable considerations favouring this approach, being that discrimination law is a law that Congress considered of the highest priority, and when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.[30]

The equal access model is also consistent with the concerns raised in the Respect@Work Report about the negative impact of current cost provisions on access to justice, especially for vulnerable members of the community, and the disadvantages of cost neutrality models for successful applicants.[31]

The equal access model should be adopted in the AHRC Act, as it provides for the most appropriate cost protection in discrimination matters, and is the most closely aligned with the intention and policy objective of Recommendation 25 of the Respect@Work Report. It solves the access to justice problems and the deterrent effect that are inherent to the other costs models. Given that there are so many systemic barriers to applicants bringing claims,[32] this is a significant opportunity to remove one of the largest barriers and thereby improve access to justice for applicants.

For a detailed overview of the advantages and disadvantages of different costs models, we refer to the submission the ACTU made to the Review, which we enclose.

[29] Consultation Paper (above at n 14) at page 21; *Civil Rights Act of 1991,* section 323(3)(e); Christianberg Garment Co v EEOC 434 US 4012 (1978).
[30] Christianberg Garment Co v EEOC 434 US 4012 (1978).
[31] Australian Human Rights Commission, Respect@Work National Inquiry into Sexual Harassment in Australian Workplaces (2020), ('Respect@Work Report') at page 507.
[32] Ibid at page 14.

Recommendations for technical amendments

Recommendation 1 – Respondent's unreasonable conduct

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

The same rule should apply to successful respondents. That is, the Bill should contain a provision to the effect that a successful respondent may be liable for costs where their unreasonable act or omission has caused the applicant to incur those costs. This is consistent with the costs provisions in the *Fair Work Act 2009* (Cth) (**FW Act**) (where one party can be ordered to pay costs to the other party where their unreasonable act or omission has caused the other party to incur those costs), and is necessary as a matter of fairness. Without the same rule being applied to both parties, it is possible that successful respondents who have engaged in unreasonable conduct (for example, by unreasonably dragging out or delaying litigation, failing to comply with court orders and rules, or engaging in an abuse of court processes) substantially increase the costs of litigation for applicants without potentially being liable for those costs.

We propose the following wording be included in the Bill:

S46PSA(5) Where the respondent is successful, they may be ordered to pay costs to the applicant if the court is satisfied that the respondent's unreasonable act or omission caused the applicant to incur the costs.

Recommendation 1 – the Bill be amended so that successful respondents may be liable for costs incurred by applicants as a result of the respondent's unreasonable act or omission.

Recommendations 2 and 3 – Guidance on unreasonable act or omission

It is very important that there is guidance on what constitutes an unreasonable act or omission, and the ACTU is pleased to see that there is some guidance in this respect contained in the Explanatory Memorandum (**EM**).[33]

Guidance is important because the 'unreasonable act or omission' exception can be interpreted very broadly, and a number of concerns arise from this, as outlined in the ACTU submission to the

[33] Explanatory Memorandum at [13].

Review. In particular, the mere refusal of a settlement or Calderbank offer could constitute unreasonable behaviour – there are cases where refusal of such an offer by an applicant has been found to constitute an unreasonable act or omission causing the respondent to incur costs, and thereby resulted in a costs order against the applicant.[34]

Settlement offers are often used and exploited as part of a litigation strategy to ensure that a respondent can recoup its costs and put pressure on applicants to settle,[35] and has little to do with the particular merits or circumstances of the claim. Unions affiliated to the ACTU report that this strategy is increasingly being used by respondents, and that the prospect of the refusal of a settlement offer being found to be unreasonable conduct has a chilling effect on workers proceeding with litigation, even where they are seeking important non-monetary outcomes such as declarations or civil penalties.

Further, in light of the new Respect@Work Guidelines on confidentiality clauses,[36] it is both likely and desirable that increasing numbers of applicants will not want to agree to non-disclosure/confidentiality clauses as part of a settlement. The threat of costs for unreasonable conduct in refusing a settlement offer which includes such a clause should not hang over their heads – this is effectively another way in which applicants could be forced into silence.

Some applicants may also not understand the nature and meaning of Calderbank offers and should not face costs orders because of this. Further, applicants who are not legally represented may be at risk of being considered to act unreasonably if they cause delay in proceedings due to a lack of knowledge and understanding of litigation, without understanding the impact of any such delay on respondents.

Finally, there are a range of reasons an applicant may choose not to participate in mediation or conciliation, including the impact of such processes which can be distressing, triggering and retraumatising for applicants, and pose a risk to their health and safety, especially if an individual respondent who is alleged to have discrimination against or sexually harassed them is also present. In such circumstances it may be appropriate for applicants to either not participate or to be allowed to participate in ways that do not involve them being in the same space as the respondent. This should not be considered unreasonable conduct.

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[34] *Adamczak v Alsco Pty Ltd (No 4)* [2019] FCCA 7; *Melbourne Stadiums Ltd v Saunter* (2015) 229 FCR 221 [144]; *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102.
[35] Free and Equal Position Paper (above at n 21) at page 194; ANU Report (above at n 9) at page 91
[36] Respect@Work Council (December 2022) Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints | Respect@Work (respectatwork.gov.au)

Given these concerns, the ACTU's position in our submission to the Review was that wording regarding unreasonable behaviour should not be included in any proposed legislation. We note that such wording has been included in the Bill, and notwithstanding our concerns, we are supportive of this wording as long as there is adequate guidance on what constitutes an unreasonable act or omission. The guidance contained in the EM is helpful, but should be expanded upon.

Firstly, the EM contains guidance in relation to the phase as used in s46PSA(4), but not in relation to the phrase as used in s46PSA(6)(b). It should be made clear in the EM that this guidance applies to both subsections, given that both deal with adverse costs orders that may flow from an applicant's unreasonable act or omission.

Recommendation 2 – the Explanatory Memorandum should make clear that guidance in relation to an unreasonable act or omission contained at paragraph [13] applies to both s46PSA(4) and s46PSA(6)(b).

Secondly, we remain concerned that despite the guidance in the EM, the refusal of an offer of settlement could still be found by a Court to constitute an unreasonable act or omission that could result in a costs order against an applicant. Applicants who refuse a Calderbank offer risk an adverse costs order for indemnity costs if they proceed with the claim and receive a less favourable outcome. Similar costs rules are contained in the *Federal Court Rules 2011* (Cth) (**FCR**), which make provision for offers of compromise pursuant to Rule 25.14. Whilst these may be appropriate in commercial disputes, in a human rights jurisdiction where the applicant has been personally affected, they have a chilling and oppressive impact on victim-survivors, by allowing respondents to use settlement offers and the threat of indemnity costs to force applicants to settle – the very opposite of what the Bill is trying to achieve. We are concerned about how the FCR and the Calderbank offer principles would interact with the guidance in the EM, and the remaining discretion the court may have in relation to settlement offers.

Therefore, the Bill should be amended to expressly exclude the consideration of formal and informal settlement offers (including Calderbank offers and offers of compromise) in relation to any discretion to award costs against an applicant. This could be done by adding some wording to the end of s46PSA(5), so that it reads as follows (proposed wording underlined):

(5) Subject to subsection (6), the applicant must not be ordered by the court to pay costs incurred by another party to the proceedings, notwithstanding their refusal of any settlement offer, including an offer of compromise made in accordance with FCR 25.14 or a Calderbank offer.

Recommendation 3 – amend the Bill to expressly exclude the consideration of formal and informal settlement offers (including Calderbank offers and offers of compromise) in relation to any discretion to award costs against an applicant.

Recommendation 4 – Exception in s46PSA(6) (c)

The exception included in s46PSA(6)(c) is a departure from the principles and rationale of the equal access model, in that it introduces an additional exception where applicants may be ordered to pay a respondent's costs.[37] The ACTU's preference is that this exception is not included in the Bill, as we do not consider it to be necessary, and are concerned that it waters down the provisions, may be used too frequently and will undermine the beneficial intent of the provisions. The vast majority of respondents will be companies and organisations rather than individuals, and most organisations will have insurance that covers their legal fees, or can offset their legal costs in other ways. Individual applicants on the other hand have no such protections. It also implies that only certain types of applicants should have costs protection against certain types of respondents, reinforcing the barriers to justice facing applicants. Applicants should not have to risk facing financial ruin when seeking to vindicate their rights, regardless of who the respondent is.

Further, the public interest in reasonable claims being litigated to allow these societal issues to be addressed, the resulting benefits to the community and not unreasonably burdening an applicant seeking to litigate such a claim, outweighs any perceived impact on respondents.

However, if the Committee is of the view that there should be an exception of this type, we believe its narrow construction is appropriate.

Recommendation 4 – The exception contained in s46PSA(6)(c) should be removed from the Bill.

[37] For example, such an exception is not included in the costs protection provisions contained in Section 1317 AH of the *Corporations Act 2001* (Cth); section s 14ZZZC of the *Taxation Administration Act 1953* (Cth); and section 18 of the *Public Interest Disclosure Act 2013* (Cth).

Response to concerns regarding the Bill

Some concerns regarding the costs protection provisions in the Bill have been raised in the submissions of other organisations to the Committee. We seek to briefly address these concerns.

Aren't these costs provisions novel?

Some submissions make the erroneous claim that there has never been any other costs-related legislation like this in Australia, and that this costs regime is unlike any other that exists.[38]

Contrary to this claim, the equal access model has been adopted in different jurisdictions both internationally and domestically. In Australia, there are equal access costs provisions in three separate pieces of legislation to protect whistleblowers reporting certain unlawful conduct (**the whistleblowing provisions**).[39] The whistleblowing provisions recognise that whistleblowers act in the public interest when they speak up and should be protected from adverse costs risk, but able to recover their own costs if successful in litigation.[40] Individuals speaking up about discrimination and sexual harassment is highly analogous to the situation of whistleblowers who find themselves to be a threat to an organisation that will try to silence them in order to protect its own reputation, brand and bottom line. The individualisation of our anti-discrimination laws means that applicants are acting in the public interest when bringing a claim, by seeking to vindicate legal rights that contribute to wider social change.[41]

The whistleblowing provisions constitute a precedent, are designed to encourage whistle-blowers to come forward, and have not led to any significant increase in claims.

Won't the Bill impact negatively on alternative dispute resolution?

Some submissions raise concerns that some aspects of the Bill may have unintended consequences on the effectiveness of alternative dispute resolution options aimed at facilitating the early resolution of complaints, including early offers of settlement and conciliation processes, and the processes of the Australian Human Rights Commission (**the Commission**).[42] These

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[38] For example, see Submission of the Australian Christian Lobby to the Senate Legal Affairs and Constitutional Committee on the Australian Human Rights Commission (Costs Protection) Bill 2023 ('ACL submission') at pages 5-6, 8.
[39] Section 1317 AH of the *Corporations Act 2001* (Cth); section s 14ZZZC of the *Taxation Administration Act 1953* (Cth); and section 18 of the *Public Interest Disclosure Act 2013* (Cth)
[40] ANU Report (above at n 9) at page 101.
[41] Ibid.
[42] Submission of the Australian Human Rights Commission to the Senate Legal Affairs and Constitutional Committee on the Australian Human Rights Commission (Costs Protection) Bill 2023 ('AHRC submission') at pages 5-7.

concerns include that there will be little incentive for an applicant to consider a reasonable offer to settle a matter early or at all, may reduce the incentive for parties to take genuine steps to resolve a complaint and meaningfully engage in the Commission's processes and ultimately lead to an increase in the number of matters proceeding to court and to final hearing at trial.[43]

Our view is that these concerns are unfounded. Parties still have an overwhelming incentive to settle matters, and the reality is that the vast majority of matters settle.[44] On average less than 3% of finalised complaints proceed to court, and the number that proceed to hearing is even lower.[45] These incentives include:

- the inherent uncertainty of litigation, especially in the area of anti-discrimination law which is highly technical;[46]
- the significant time, cost, work and emotional energy demanded by litigation which deters most people from pursuing a claim to court;[47]
- the financial impact on applicants if they are unsuccessful (noting that unsuccessful applicants would still need to bear their own legal costs under this model, which in itself makes litigation impossible or out of reach for many);
- the impact on applicants' mental health and wellbeing of going through the litigation process, which is often retraumatising and exacerbates harm;[48]
- the public nature of proceedings;
- Conciliation processes are confidential and can be positive for applicants as it allows them to speak about the impact of the conduct on them;
- Conciliation offers an opportunity to negotiate tailored, meaningful and creative non-monetary outcomes that a court would not be able to order[49] – such as changes an organisation may commit to prevent future conduct and change its culture, or by providing an apology or a reference to the applicant.

Therefore, parties still have significant incentives to consider offers of settlement, take genuine steps to resolve a complaint, and to meaningfully engage in Commission processes. These incentives to settle matters, combined with the well-known and well documented barriers to even bringing a complaint of discrimination or sexual harassment in the first place, means that the

[43] Ibid.
[44] Consultation Paper (above n 14) at page 16; c at page 18.
[45] Consultation Paper (above n 14) at page 15; Free and Equal Position Paper (above n 21) at page 103.
[46] ANU Report (above n 9) at page 80.
[47] Ibid.
[48] Ibid.
[49] Ibid.

amount of complaints that make it to final hearing and determination is miniscule. This has an adverse impact on justice – the dearth of case law means applicants have few cases to refer to for guidance, including on what outcomes they may be able to achieve. The lack of judicial consideration means the law is slow to evolve, there are few test cases, and damages awards stay low and do not keep pace with community standards. Further, there is a lost opportunity for decisions that encourage systemic change to workplace cultures, and for the development of judicial expertise and specialisation.

The experience of the ACTU and our affiliates is that currently, respondents often do not take genuine steps to resolve a complaint or meaningfully engage in Commission processes. Common strategies used by respondents include offering no financial compensation at conciliation, or making woefully low offers that demonstrate a profound lack of interest in taking the complaint and the process seriously.[50] Research shows that this is particularly the case for low income and vulnerable workers, who are lucky to receive a small amount of damages, in comparison to higher income earners who are far more likely to be able to get significant damages and recoup their costs.[51] Rather than removing incentives for parties to settle, the Bill, by removing barriers to justice for applicants, will create incentives for respondents to genuinely engage in alternative dispute resolution, including at an early stage.

The concerns raised are also grounded in an assumption that an increase in the number of matters proceeding to court and final determination is undesirable. On the contrary, an increase in case law will achieve justice for those subjected to sexual harassment and discrimination, provide better guidance into the future, resolve areas of law that are uncertain or untested, revisit the appropriate level of damages, and give applicants greater insight into what kinds of outcomes they can achieve. The Commission itself has acknowledged that the lack of cases that go to court results in limited jurisprudence, making it hard to advise potential litigants on the merits of their claim, and dissuading applicants with meritorious claims from commencing action.[52]

Discrimination and sexual harassment are endemic yet largely hidden from view. If more matters are pursued in the courts, there will be increased judicial consideration and case law that sends

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[50] See also ANU Report (above n 9) at page 79: *"Applicants may feel pressured to settle quickly for a low amount. In some circumstances, an unsophisticated employer may regard conciliation as an opportunity to bully the complaint. As one community legal centre employment and discrimination lawyer said: 'We had one the other day [who] said, "We insist on a face-to-face conciliation at the Australian Human Rights Commission so I can look them in the eye and tell them I'm not paying them a cent."*

[51] ANU Report (above n 9) at pages 6, 78.

[52] Free and Equal Position Paper (above n 21) at page 191.

the message that such behaviour is unacceptable and there are consequences for that behaviour. This in turn helps to shift social and workplace norms and leads to safer and more inclusive workplaces and communities, reflecting the aims of the Respect@Work Report regarding cultural change.

There is also no evidence that the whistleblowing costs provisions, which use an equal access model, have led to a significant increase in litigation and claims being made.

The Commission's submission proposes that the Bill be amended to enable courts to have regard to settlement offers in the determination of costs. For the reasons outlined earlier in this submission, we disagree and believe this would operate oppressively on applicants and is not appropriate in a human rights jurisdiction. Further, this would risk the process being overly focused on financial offers and financial outcomes, and misses the fact that applicants are often seeking important non-financial terms, as well as the overriding public interest in people who have experienced discrimination and harassment vindicating their rights, both for themselves but also on behalf of the wider community.

Won't there be a big increase in unmeritorious claims?

Some submissions claim that the Bill would encourage unmeritorious claims to be brought,[53] that it would make bringing claims "virtually cost and risk free for complainants,"[54] with the risk that "Australians may be financially ruined for things that should never have been alleged under discrimination legislation in the first place."[55]

These concerns are unfounded and, in some instances, misunderstand the Bill's provisions.

Firstly, there are already sufficient protections in place that discourage unmeritorious complaints from being made that respondents have the benefit of, such as the ability for the AHRC to terminate unmeritorious complaints[56], the fact that complaints terminated on these grounds are

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[53] For example see Submission of the Human Rights Law Alliance to the Senate Legal Affairs and Constitutional Committee on the Australian Human Rights Commission (Costs Protection) Bill 2023 ('HRLA Submission') at [3]; Joint Submission of Adventist Schools Australia, Australian Association of Christian Schools and Christian Schools Australia to the Senate Legal Affairs and Constitutional Committee on the Australian Human Rights Commission (Costs Protection) Bill 2023 ('Joint Schools Submission') at page 5; ACL Submission (above n 38) at page 6.

[54] ACL Submission (above n 38) at page 6; see also HRLA Submission (above n 53) at [6].

[55] ACL Submission (above n 38) at page 6.

[56] The President of the AHRC must terminate a complaint if they are satisfied that it is trivial, vexatious, misconceived or lacking substance; or there would be no reasonable prospect that the court would be satisfied the complaints amounts to unlawful discrimination – s46PH *Australian Human Rights Commission Act 1986* (Cth). The President also has a discretion to terminate complaints that they consider do not amount to unlawful discrimination.

only able to proceed to court with the leave of the court,[57] and the ability to have proceedings struck out.[58] The Commission has previously expressed its view that further disincentives for people bringing unmeritorious complaints are not required, and that the current rules on costs in the federal courts have a more profound deterrence effect on meritorious complaints.[59]

Further, there are protections built into the equal access model itself. Respondents can recover costs where proceedings are instituted vexatiously or without reasonable cause, or where the applicant has engaged in an unreasonable act or omission. Unmeritorious complaints will be discouraged by the risk of an adverse costs order in these circumstances, thereby providing disincentives to applicants to initiate such actions and protecting respondents from unmeritorious claims. Given these protections, it is highly unlikely that there will be an increase in unmeritorious claims. There is also no evidence that the whistleblowing costs provisions have led to an increase in unmeritorious claims.

If a complaint has sufficient merit to be considered reasonable, then it is appropriate to have the option of having it considered by a court. 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. Given that less than 3% of finalised complaints proceed to court, the risk of an increase of unmeritorious claims in real numbers is very low.

Secondly, the claim that bringing discrimination proceedings will be cost and risk free for applicants is completely without merit. As outlined above, applicants still face substantial barriers to bringing claims at all, and even if they do, are heavily deterred from pursuing those claims by the significant time, work, cost and emotional energy demanded by litigation, the potential financial impacts as well as the impacts on their mental health and wellbeing.

Finally, there is no risk that "Australians will be financially ruined for things that should never have been alleged under discrimination law." This claim fundamentally misunderstands the nature of the provisions in the Bill. If a claim contains things that should never have been alleged under discrimination law, it will be a vexatious or unreasonable claim, and not only will the

[57] S46PO *Australian Human Rights Commission Act 1986* (Cth); Free and Equal Position Paper (above n 21) at pages 192, 200.
[58] Rule 16.21 of the *Federal Court Rules 2011* (Cth)
[59] Free and Equal Position Paper (above n 21) at page 192.

respondent not be liable for the applicant's costs, the respondent will be entitled to recoup their own legal costs.

Why does the Bill differ from the original recommendation?

Some submissions raise concerns that the provisions in the Bill are not in line with the original Recommendation 25 of the Respect@Work Report and that there has been no justification or rationale for the changed approach, nor widespread public consultation.[60] These claims lack significant context.

Recommendation 25 of the Respect@Work Report called for a costs protection provision to be inserted in the AHRC Act that was consistent with the provisions in s570 of the FW Act (hard costs neutrality), in recognition that the risk of an adverse costs order was a strong deterrent to applicants seeking redress.[61] However, the Commission subsequently recommended moving to a different costs model (soft costs neutrality) in its 2021 report Free and Equal: A reform agenda for federal discrimination laws.[62] This was due to significant issues the Commission identified with the hard costs neutrality model and its impact on access to justice. [63]

The soft costs neutrality provisions were included in the initial Respect@Work Bill. However, following significant concerns raised across the sector (including the community legal sector, legal professionals, unions, academics and others), these provisions were removed from the Respect@Work Bill, and the matter was referred by the Government to the Attorney-General's Department for review. The Consultation Paper was published and any interested organisations had the opportunity to make submissions to the Review, which are publicly available. [64] Claims that the equal access model was "roundly criticised" in the Senate Committee Inquiry that looked at the Respect@Work Bill[65] are incorrect. During that Inquiry, there were many organisations which supported an equal access costs model.[66]

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[60] Joint Submission of Adventist Schools Australia, Australian Association of Christian Schools and Christian Schools Australia to the Senate Legal Affairs and Constitutional Committee on the Australian Human Rights Commission (Costs Protection) Bill 2023 ('Joint Schools Submission') at page 4.

[61] The Respect@Work Report did also acknowledge, however, that the FW Act model would disadvantage successful applicants – see Respect@Work Report (above n 31) at page 507.

[62] Australian Human Rights Commission (December 2021) Free and Equal: A reform agenda for federal discrimination laws ('Free and Equal Position Paper').

[63] Free and Equal Position Paper (above n 21) at pages 191-200.

[64] Those submissions are available online - Published responses for Review into an appropriate cost model for Commonwealth anti-discrimination laws - Attorney-General's Department - Citizen Space (ag.gov.au)

[65] Joint Schools Submission (above n 60) at pages 1-2.

[66] 16 submissions made to the Senate Standing Committee on Legal and Constitutional Affairs on the Anti-Discrimination and Human Rights Legislation Amendment Respect@Work Bill 2022 were supportive of the Equal Access model.

During the consultation process, a strong consensus emerged that the equal access model was the model that would best achieve the policy objectives of Recommendation 25 and the Respect@Work Report, and was widely seen as being superior to the soft and hard costs neutrality models that had previously been proposed. This consensus was demonstrated by submissions to the Review and by the Power to Prevent Coalition, with 85 organisations endorsing a call for an equal access model.[67] The ANU Report commissioned by the Government also recommended a move to this model, finding that sexual harassment and discrimination complainants should receive equivalent costs protections to whistleblowers.[68]

Contrary to the claims made in some submissions that there has been an abandonment of the original scheme without any rationale or consultation[69], there has been an extensive consultation process undertaken by the Government during the last 12 months, which all interested organisations had an opportunity to participate in. The result of that consultation is the Bill, which reflects the broad consensus reached during the consultation process.

Some of the reasons why such a strong consensus has emerged regarding the equal costs model include:

- It overcomes the deterrent effect that an adverse costs order poses to applicants – a significant reform that many in the sector have been calling for, for decades
- It addresses the power imbalances and resource disparities present in most unlawful discrimination proceedings
- It ensures that applicants can access legal representation and do not have to only rely on pro bono assistance
- It is the only model that will ensure the damages awarded to successful applicants are not eaten into by their costs (a very important issue given damages are generally very low and legal costs can often be higher than the damages received).
- It is the only model that does not entrench and exacerbate power imbalances and barriers to access to justice.

When the Respect@Work Report was published, costs reform was an emerging area of law that needed further review, and there were differing views about which approach to take. It was therefore important for the Government to consider which model was most appropriate, which

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[67] Response 421918623 to Review into an appropriate cost model for Commonwealth anti-discrimination laws - Attorney-General's Department - Citizen Space (ag.gov.au)
[68] ANU Report (above n 9) at page 101.
[69] Joint Schools Submission (above n 60) at page 4.

they did through the Review. Prior to this, the equal access model had not been properly considered (it was not considered as an option in either the Respect@Work Report or the Free and Equal Paper, despite some organisations advocating for it).[70] What has become clear over the last 12 months is that there is a strong consensus that the equal access model is not only the most appropriate model, but it is the model which best achieves the policy objectives of the Respect@Work Report.

Why does the Bill apply to all forms of discrimination and harassment?

Some submissions raise concerns that the costs protection provisions in the Bill apply to all forms of discrimination and claim that this goes beyond the original scope of the Respect@Work Report and does not reflect the original recommendation.[71]

This is incorrect. Recommendation 25 called for new costs provisions to be inserted in the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), which applies across the board to all federal anti-discrimination legislation. There was no distinction made between different kinds of discrimination and harassment.[72] In the Free and Equal Position Paper, the Commission advocated for a soft costs neutrality model that would apply to all forms of discrimination and harassment.[73] This was reflected in the costs provisions initially included in the Respect@Work Bill, which applied across the board. There was never a proposal that the costs provisions applying to sex discrimination and sexual harassment should be different from those applying to other forms of discrimination and harassment.

There is no good policy basis to distinguish between sexual harassment and sex discrimination and other forms of discrimination and harassment when it comes to the issue of costs. In fact, there are very good policy reasons to apply the same costs model, including:

- Having different costs models for different kinds of discrimination would lead to unnecessary and undesirable complexity, something legislative reform should avoid.
- All forms of discrimination involve fundamental power imbalances and entrenched inequality, which the equal access costs model addresses.

[70] Free and Equal Position Paper (above n 21) at pages 195-200.
[71] Joint Schools Submission (above n 60) at page 3.
[72] Respect@Work Report (above n 31) at page 507.
[73] Free and Equal Paper (above n 21) pages 191-201

- Arguably, this kind of costs model is even more important for other kinds of discrimination where damages awards are significantly lower than they are in sexual harassment, as demonstrated by the ANU Report.[74]
- The Respect@Work Report also highlighted the intersectional nature of sexual harassment and the fact that many people experience sexual harassment along with other forms of discrimination – so having a consistent costs model reflects the reality of how sexual harassment and other forms of discrimination often occur together.
- Having an equal access model for all forms of discrimination will improve outcomes more broadly, and will make workplaces safer.

Doesn't the Bill impact a respondent's access to a "fair trial"?

Some submissions raise concerns that the Bill will compromise the proper defence of claims, deprive litigants of their right to defend themselves, have serious implications for a fair trial and is therefore itself discriminatory.[75] These concerns are without foundation and fundamentally misunderstand the provisions.

The claim that there are "serious fair trial implications with this Bill, when anyone facing discrimination allegations is immediately exposed to potentially devastating costs orders" and are therefore "coerced into settling"[76] is completely unfounded. Nor will the financial risks from adverse costs orders be excessive or unfeasible from the outset.[77] The financial risks faced by respondents will largely be unchanged, in that there has always been a high risk of adverse costs orders for unsuccessful respondents. This is appropriate in circumstances where respondents are found to have engaged in unlawful discrimination - if the goal is to increase access to justice and disincentivise discrimination, we should not be uncomfortable with costs being awarded against unsuccessful respondents, and at least no more uncomfortable than we are with damages being awarded.[78] If respondents are successful, they will not face an adverse costs order against them, and will still be able to recoup their costs in some circumstances.

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[74] ANU Report (above n 9) at page 42.
[75] HRLA Submission (above n 53) at [3] and [9]; ACL Submission (above n 38) at page 7.
[76] ACL Submission (above n 38) at page 7.
[77] HRLA Submission (above n 53) at [3]; ACL Submission (above n 38) page 7.
[78] Thomas D Rowe, 'The Legal Theory of Attorney Fee Shifting: A Critical Overview' *Duke Law Journal* (1982) 651. 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": 670-671.

There is therefore no coercion of respondents to enter into a settlement (which are often made on a "no admissions" basis, contrary to the claim that respondents will be forced to admit accusations to avoid costs orders[79]). Rather, there will be less coercion of applicants to settle claims for unsatisfactory outcomes, as they will no longer face bankruptcy or huge debts simply for enforcing their rights, and respondents will be more likely to genuinely engage with Commission processes rather than low-balling applicants in the knowledge they are unlikely to pursue their claim in the courts.

Rather than the Bill being discriminatory,[80] it aims 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, better enabling applicants to vindicate their rights. Under the current costs model, respondents are often not being ordered to pay the costs of successful applicants, and successful applicants are often being ordered to pay the costs of respondents. This is not a just or desirable outcome. The equal access model does not impose anything unfair on respondents - it simply ensures that applicants can recoup their costs if they are successful, and that applicants are not deterred from initiating proceedings due to the risk of an adverse costs order against them.

Conclusion

This Bill is a breakthrough development for victim-survivor rights to legal justice. The ACTU fully supports the Bill and recommends a few technical amendments which we believe will strengthen the Bill and ensure its aims are not undermined in practice. We urge the Committee to recommend its passage.

The equal access model solves the problems inherent in other costs models by removing the deterrent effect of adverse costs orders and enabling people to access legal representation, without disadvantaging respondents. In a system which still relies heavily on individuals who have experienced discrimination and harassment bearing the burden of bringing complaints forward, the legal framework should ensure they are not punished for doing so, and are able to vindicate their rights – both as individuals, and on behalf of society as a whole. The equal access model is the most consistent with the intention and aims of the Respect@Work Report, as rather than entrenching existing inequalities and barriers to justice, it is the model that will most

[79] ACL Submission (above n 38) at page 7.
[80] HRLA Submission(above n 53) at [9].

effectively increase access to justice by overcoming some of those barriers, and is crucial to ensuring that Respect@Work is effectively implemented in practice.

The Bill, in adopting a modified equal access model, will remove a significant barrier to accessing justice, ensure applicants can access legal representation and are supported to come forward without the risk of becoming bankrupt or facing significant debt simply for enforcing their rights. This will in turn lead to greater judicial consideration of anti-discrimination laws, send a clear message that this behaviour is unacceptable, allow damages awards to better reflect community standards, and contribute to systemic cultural change. This reform is a huge and necessary step forward in addressing and preventing discrimination and harassment into the future.

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