



Australian
Human Rights
Commission

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

Australian Human Rights Commission

Submission to the Attorney-General's Department

12 April 2023

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Contents

1	Introduction	3
2	Recommendations.....	4
3	Current model.....	4
4	'Hard cost neutrality' model	5
5	'Soft cost neutrality' model.....	6
6	Asymmetrical cost model	8
7	'Applicant's choice' model.....	9
8	Preferred cost model.....	10

1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Attorney-General's Department (AGD) in relation to its review into an appropriate cost model for Commonwealth anti-discrimination laws.
2. The Commission heard in its National Inquiry into Sexual Harassment in Australian workplaces (Respect@Work inquiry) that the current cost regime in the federal courts operates as a significant disincentive for applicants to pursue sexual harassment matters under the *Sex Discrimination Act 1984* (Cth) (SDA), particularly for vulnerable members of the community.¹ The federal courts have generally exercised discretionary powers to make costs orders according to the guiding principle that 'costs follow the event'. The threat of an adverse costs order is reported to discourage the pursuit of legitimate claims.
3. In 2020, the Sex Discrimination Commissioner released the Commission's 'Respect@Work: National Inquiry into Sexual Harassment in Australian workplaces Report' (Respect@Work report).² That report made 55 recommendations.
4. Recommendation 25 proposed that the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) be amended to insert a cost provision consistent with s 570 of the *Fair Work Act 2009* (Cth) (Fair Work Act), referred to in the AGD's 'Consultation Paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws' (Consultation Paper) as 'hard cost neutrality'.³
5. The Commission's Free and Equal project involved wide consultation on the issue of costs in unlawful discrimination matters. The Commission's view on an appropriate cost model to address the issues raised in consultation evolved to recommending a cost regime under which the default position would have each party bearing their own costs with a discretion for the court to award costs in the interests of justice having regard to certain mandatory criteria. This model is referred to in the Consultation Paper as 'soft cost neutrality'.⁴
6. The Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 proposed amendments in Schedule 5 to implement Recommendation 25 consistent with the soft cost neutrality approach proposed by the Commission in its 'Free and Equal: A reform agenda for federal discrimination law — Position Paper' ('Free and Equal position paper').⁵

7. The Commission provided a submission to the Senate Legal and Constitutional Affairs Committee in October 2022 concerning, amongst other things, the cost model proposed for federal discrimination law matters in the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.⁶ The Commission supported the costs model proposed in the Bill.
8. The amendments in Schedule 5 were removed prior to passage of the Bill, with the government referring the issue of an appropriate costs model to the AGD.
9. This consultation process by the AGD is being conducted to determine an appropriate costs protection model for federal unlawful discrimination matters. The AGD's Consultation Paper proposes four cost models for consideration:
 - Hard cost neutrality model
 - Soft cost neutrality model
 - Asymmetric cost model
 - Applicant's choice model.

2 Recommendations

10. The Commission makes the following recommendations:

Recommendation 1

The Commission recommends that the AHRC Act be amended to insert a cost provision consistent with the 'soft cost neutrality' model proposed in the AGD's Consultation Paper.

Recommendation 2

The legislative amendments to the AHRC Act include a provision requiring a review of the operation of the amendments to be conducted within 5 years of their commencement.

3 Current model

11. There are presently no specific provisions relating to costs in unlawful discrimination proceedings before the Federal Court of Australia (FCA) or the Federal Circuit and Family Court of Australia (FCFCA).
12. Under federal discrimination law, complaints of unlawful discrimination must first be made to the Commission and, where appropriate, conciliated

to seek to resolve the dispute early. Where the complaint is unable to be resolved or is terminated by the Commission for another reason, the complainant may commence proceedings in the FCA or the FCFCA. Depending on the nature of the termination, leave of the court may be required to proceed with the matter to court.

13. While the federal courts have a general discretion to order costs under the provisions of their establishing legislation and the power to make cost-capping orders,⁷ that discretion is generally exercised according to the principle that ‘costs follow the event’ and cost capping orders are seldom made. This means that, ordinarily, the unsuccessful party is required to pay the costs of the successful party.
14. The costs involved in legal proceedings can be considerable and the Commission heard in consultation that the threat of an adverse costs order may discourage the pursuit of legitimate discrimination claims in the courts.
15. The Commission heard in its Respect@Work inquiry that the current cost regime in the federal courts operates as a significant deterrent to people in deciding whether to pursue sexual harassment matters under the SDA in the federal courts, particularly for vulnerable members of the community.⁸ Similar concerns were expressed in the Commission’s consultation for its Free and Equal project, which looked at the reform of federal discrimination law more broadly. Each of those inquiries recommended legislative reforms to the AHRC Act to adopt costs provisions which would apply across all of the federal discrimination laws to reduce barriers to legal proceedings in the federal courts and facilitate greater access to justice.
16. The Commission acknowledges that the question of an appropriate cost model that is fair, certain and facilitates access to justice, is complex and reasonable minds may differ on the best model. What is clear, however, is that reform is necessary and, in the Commission’s view, a holistic approach must be taken to ensure that the model adopted is balanced and takes account of all the claims that may arise under each of the federal discrimination laws.

4 ‘Hard cost neutrality’ model

17. The Commission recommended in its Respect@Work report that the AHRC Act be amended to insert a cost provision consistent with s 570 of the Fair Work Act.
18. Section 570 of the Fair Work Act provides that costs may only be ordered against a party by the court if satisfied that the party instituted the

proceedings vexatiously or without reasonable cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs, or if the court is satisfied that the party unreasonably refused to participate in a matter before the Fair Work Commission and the matter arose from the same facts as the court proceedings. This approach is referred to in the Consultation Paper as 'hard cost neutrality'.

19. This model operates in a number of jurisdictions and significantly reduces the risk of an adverse costs order and provides greater certainty to the parties.
20. The Commission's Free and Equal project involved wide consultation on the issue of costs in unlawful discrimination matters across all four federal Discrimination Acts. It heard concerns about this model, including that this approach would require the applicant to bear their own costs even where they were successful in their claim and that it might have the unintended consequence of reducing the willingness of lawyers to represent clients in unlawful discrimination matters where they are unable to be reimbursed for their own legal costs.
21. For the reasons set out in the Free and Equal position paper,⁹ the Commission's view on an appropriate cost model to address the issues raised in consultation evolved to a cost regime that is referred to in the Consultation Paper as a 'soft cost neutrality' model.¹⁰ This view has not changed.

5 'Soft cost neutrality' model

22. The Commission's Free and Equal position paper proposed a cost regime for unlawful discrimination matters under which the default position would have each party bearing their own costs with a discretion for the court to award costs in the interests of justice having regard to certain mandatory criteria.¹¹ This approach is referred to in the Consultation Paper as the 'soft cost neutrality' model and was the model reflected in the amendments proposed in the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.¹² This model in turn was similar to the one set out in s 117(2A) of the *Family Law Act 1975* (Cth).
23. The Bill proposed that the court must have regard to the following criteria in its consideration of whether to deviate from the default position that each party bear their own costs and award costs in the interests of justice:
 - the financial circumstances of each of the parties to the proceedings

- the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)
 - whether any party to the proceedings has been wholly unsuccessful in the proceedings
 - whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings or the matter the subject of the complaint and, if so, the terms of any offer
 - whether the subject matter of the proceedings involves an issue of public importance
 - any other matters that the court considers relevant.
24. Some of the concerns with this model raised in the Consultation Paper include that the approach does not go far enough to overcome the deterrent effect of an adverse costs order and does not provide sufficient certainty to applicants on how costs are to be awarded.
25. In the Commission's view, this model expands on the 'hard cost neutrality' approach and allows for a more nuanced and flexible assessment of costs in the interests of justice in individual matters, including by allowing a successful applicant the opportunity to recover their costs. While that flexibility necessarily reduces the degree of certainty of how costs may be awarded, the discretion of the court is limited to making an award of costs 'in the interests of justice' having regard to the particular circumstances of the case and guidance is provided to the court by way of mandatory considerations. The Explanatory Memorandum to the Bill provided some illustrative examples that would also provide guidance to the courts on the intended operation of the proposed provisions,¹³ and greater certainty would be developed over time with the application of the law by the courts. In addition, the Commission considers it may be appropriate that a review of the operation of the cost provisions be conducted within 5 years to ensure the provisions are operating as intended.
26. Overall, this remains the Commission's preferred model as representing a more balanced and holistic approach to the determination of costs in unlawful discrimination matters.
27. The Consultation Paper proposes other matters that may be included as mandatory considerations for the court. The discretion afforded to the courts is broad, with the ability to consider 'any other matters that the court considers relevant', however the Commission considers that it may also be appropriate to direct the court to consider the following additional matters:

- whether any party to the proceedings is receiving assistance provided by the Attorney-General's Department, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance)
- whether a party has been responsible for unreasonably prolonging or delaying the time taken to complete the proceedings
- whether a party conducted proceedings in a way that unnecessarily disadvantaged another party to the proceedings
- whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance.

6 Asymmetrical cost model

28. The asymmetrical or 'equal access' model involves each party bearing their own costs if the applicant is unsuccessful; but if the applicant is successful, the respondent will pay the applicant's costs. The applicant will not pay the respondent's costs unless they have acted vexatiously or unreasonably in commencing the proceedings or in their conduct in the proceedings.
29. While this approach almost entirely eliminates the risk of an adverse costs order against an applicant, it is not the Commission's preferred model as it does not represent a balanced approach, significantly favouring the applicant, and that a more holistic approach having regard to all of the federal discrimination laws and all potential respondents to unlawful discrimination proceedings should be adopted.
30. Significantly, complaints of unlawful discrimination to the Commission are commonly made against individuals and small businesses, not just government agencies and large corporations. As expressed in the Free and Equal position paper, an appropriate cost model must strike a balance between reducing barriers to complainants' participation in the courts and the burden on respondents and the court system.¹⁴ Moving the financial risk and disincentive for unmeritorious claims to the respondent may not always be fair in the circumstances of the case.

7 'Applicant's choice' model

31. The 'applicant's choice' model involves an applicant making an election between the following two costs models at the commencement of legal proceedings:
 - the current model guided by the principle that 'costs follow the event', and
 - hard cost neutrality.
32. The Commission has not had the benefit of consultation on this costs model and welcomes the opportunity to hear a variety of views through this consultation process. However, the Commission makes the following preliminary observations.
33. First, consultation for both the Respect@Work inquiry and Free & Equal project emphatically communicated that the current model caused significant barriers to the pursuit of legitimate unlawful discrimination proceedings in the federal courts and that legislative reform was required. While this costs model proposes to provide applicants with an option up front and allows a consideration of the merits of a case before commencing legal proceedings, applicants may still be exposed to the risk of a significant adverse cost order.
34. Second, this model creates an additional layer of complexity to unlawful discrimination claims and may foster greater reliance on lawyers. The Respect@Work inquiry heard in consultations that the complexity of legislative provisions created difficulties in interpretation for non-lawyers and that remedial mechanisms should be quick, simple and easy for the layperson to navigate.¹⁵ Applicants who are not legally trained may consider it necessary to obtain legal advice to understand the costs model and its impacts where they may not otherwise require the services of a lawyer.
35. The Commission's preliminary consideration is that a simpler and more accessible approach may greater assist in overcoming the barriers faced by applicants pursuing claims of unlawful discrimination.

8 Preferred cost model

36. The Commission acknowledges that the determination of an appropriate costs model that is fair, certain and facilitates access to justice is complex and that reasonable minds may differ.
37. Having regard to the proposed options for reform, the 'soft cost neutrality' model remains the Commission's preferred model. This model represents a more balanced, flexible and holistic approach to the determination of costs across all unlawful discrimination matters, allowing the courts to make cost orders in the interests of justice having regard to the particular circumstances of the case.
38. The Commission makes the following recommendations:

Recommendation 1

The Commission recommends that the AHRC Act be amended to insert a cost provision consistent with the 'soft cost neutrality' model proposed in the AGD's Consultation Paper.

Recommendation 2

The legislative amendments to the AHRC Act include a provision requiring a review of the operation of the amendments to be conducted within 5 years of their commencement.

¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) (Respect@Work report), 507 at <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>

² Respect@Work report.

³ Attorney-General's Department, Consultation Paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws (2023) (Consultation Paper), 23-25 at <https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/>.

⁴ Consultation Paper, 25-28.

⁵ Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination law — Position Paper* (2021) (Free and Equal position paper) at <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>, 191-201.

⁶ Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Anti-Discrimination and Human Rights Legislation Amendment Bill (Respect at Work) Bill 2022 (October 2022), [97]-[105] at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/RespectatWork2022/Submissions.

⁷ *Federal Court of Australia Act 1976* (Cth), s 43; *Federal Circuit and Family Court of Australia Act 2021* (Cth), s 214.

⁸ Respect@Work report, 507.

⁹ Free and Equal position paper, 191-201.

¹⁰ Free and Equal position paper, 191-201.

¹¹ Free and Equal position paper, 191-201.

¹² Consultation Paper, 25-28; Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, Schedule 5.

¹³ Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, at [351]-[353].

¹⁴ Free and Equal position paper, 196.

¹⁵ Respect@Work report, 518.