



14 April 2023

Review into an appropriate cost model for Commonwealth anti-discrimination laws
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

By email only: RespectatWork@ag.gov.au

Dear Attorney-General's Department

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

Circle Green Community Legal (**Circle Green**) welcomes the opportunity to make a submission to the Attorney-General's Department (**the Department**) on the review into an appropriate cost model for Commonwealth anti-discrimination laws (**the Review**).

About Circle Green

Circle Green is a community legal centre in WA providing state-wide specialist legal services in the areas of workplace, tenancy, humanitarian, and family and domestic violence to the WA community. Within these specialist areas, Circle Green provides services including legal advice, casework, representation, duty lawyer services, outreach, community legal education, information, referrals, advocacy, and law reform. Our services are aimed at assisting people who face vulnerability and disadvantage in gaining access to justice. You can find more information about Circle Green's services on our website: <https://www.circlegreen.org.au/>.

Workplace law services

Circle Green is the only community legal centre in WA that has a specialist workplace law practice that provides state-wide services to vulnerable and disadvantaged non-unionised WA workers on state and national workplace law. This means Circle Green has expertise in providing legal assistance to marginalised WA workers, including in advising and representing people who have been targeted by workplace sexual harassment and discrimination in legal proceedings.

Circle Green is also the lead agency in WA funded to provide legal assistance services under recommendation 53 of the *Respect@Work* report. Our state-wide Workplace Respect Project seeks to:

- Identify, understand, and monitor the prevalence and nature of workplace sexual harassment and discrimination in Western Australia so legal need can be met.
- Improve the integration and responsiveness of legal assistance and support services for marginalised groups who are experiencing workplace sexual harassment and discrimination, including those facing intersectional discrimination.

- Empower people, professions, workplaces and communities, to understand, respond to and prevent workplace sexual harassment and discrimination.
- Ensure discrimination and workplace laws protect workers and foster safe workplaces.

Further information about Circle Green’s Workplace Respect Project is available here: circlegreen.org.au/projects/workplace-respect/.

Submission

Circle Green strongly supports the equal access or asymmetrical costs model for discrimination and sexual harassment proceedings in the Federal Court and Federal Circuit and Family Court of Australia.

In this submission, we provide feedback on the models identified in the discussion paper circulated by the Review (**the Discussion Paper**) and a case study of a Circle Green client who initiated sexual harassment proceedings against her employer in a jurisdiction with soft cost neutrality.

In preparing this submission, as well as drawing our professional expertise, Circle Green has consulted with its Lived Experience Advisory Panel (**LEAP**) of people who have been targeted by sexual harassment and discrimination about the different cost models. The LEAP has provided valuable insight into whether a person deciding whether to make a claim would be more or less likely to make a claim under the different cost protection models.

Our comments on the different models identified by the Discussion Paper are outlined in the table below.

Cost Protection Model	Circle Green comments
Fair Work Act section 570 model (hard cost neutrality)	<p>Circle Green does not support a hard cost neutrality model.</p> <p>Under a hard cost neutrality model, it will be commercially unviable for most applicants to obtain legal representation for their claim because there is no prospect of recovering their legal costs from the respondent to the claim. At the same time, the federal courts are likely too procedurally strict for an applicant to navigate on their own when they are recovering from the trauma of being sexually harassed. This is especially the case when the proceedings will be made against their harasser and/or their employer who may have victimised them for reporting the harassment.</p> <p>It follows that the technical complexity of the federal courts will present a barrier to access to justice for a person bringing proceedings under a hard cost neutrality model. Such a barrier is worsened by the fact that respondents to proceedings are more likely to be better resourced and able to retain legal representation.</p> <p>In our consultations, members of the LEAP expressed negative views about hard cost neutrality despite it providing more clarity about when costs may be awarded. The key issue was that members of the LEAP found it offensive that they would be liable for paying their own legal fees when they have had a wrong done to them. Some members of the LEAP said that they would be less likely to make a claim under hard cost neutrality than they would under the present model where costs follow the event.</p>



<p>Cost neutrality with discretion model (soft cost neutrality)</p>	<p>Circle Green does not support a soft cost neutrality model.</p> <p>In addition to sharing some of the same access to justice issues as hard cost neutrality, leaving discretion to make a cost order up to the individual judge risks exposing the award of costs to the uncertainties of individual and systemic biases, and differences in judicial reasoning and interpretation. We note that sexual harassment and discrimination are areas of law where these kinds of issues are already rife. This would undermine the policy objective of providing certainty about costs to parties to proceedings. In our view, whether a cost order is “in the interests of justice” is less certain than costs following the event, even if it is determined by reference to mandatory but non-exhaustive considerations.</p> <p>We also note that the difficulty that costs neutrality presents for unrepresented litigants means that it is likely that an applicant will be disadvantaged in making submissions about costs. As with the hard costs neutrality, this factor is worsened by the likelihood that the respondent will be represented by a lawyer in proceedings.</p> <p>In consultation, LEAP members said that soft costs neutrality was as objectionable as hard costs neutrality. LEAP members said that giving discretion to the courts to make a cost order would exacerbate the feelings of disempowerment that accompany sexual harassment.</p> <p>LEAP members also objected to the premise that the interests of justice may lay with awarding costs to some people who had been targeted by sexual harassment and not others. It was noted that a soft cost neutrality model is vulnerable to judicial bias.</p>
<p>Asymmetrical cost model (equal access)</p>	<p>Circle Green strongly supports an equal access cost model.</p> <p>Specifically, we support an equal access model where:</p> <ol style="list-style-type: none"> 1. a court is prevented from ordering an applicant to pay the respondent’s costs except in limited circumstances where an applicant has instituted proceedings vexatiously or that are without merit; and 2. a respondent is liable for an applicant’s costs if the applicant is successful. <p>Circle Green does not support a broad exception from cost protection for applicants for unreasonable acts, omissions, or behaviour. We consider that such an exception may discourage people who have been targeted by sexual harassment from bringing proceedings in the federal courts. In our experience, respondents to workplace complaints in jurisdictions that have similar exceptions use them as part of an aggressive defence strategy to intimidate applicants into accepting meagre or unfavourable settlement terms (such as non-disclosure) or into discontinuing meritorious claims. Unfortunately, this strategy is often most effective when directed towards applicants who are experiencing multiple, intersecting, vulnerability and disadvantage factors.</p>



	<p>Circle Green considers that the equal access cost model is the only one that both protects applicants from costs and enables them to obtain legal representation. As such, it is the only model that addresses both disincentives of devastating debt and inaccessibility of the federal courts. It is crucial that a cost protection model addresses both of these issues, otherwise any new model will present different issues that defeat the policy objectives cost protection is designed to fix.</p> <p>Of all the cost protection models identified by the Discussion Paper, the equal access model was the only one that LEAP members said would make them more likely to pursue a claim to the federal courts.</p>
<p>Applicant choice model</p>	<p>Circle Green does not support an applicant choice model.</p> <p>We are concerned that the model adds a decision for applicants to make as they are commencing proceedings, one whose significance they may struggle to understand. Being faced with a confusing question at the start of proceedings may present a barrier to applicants moving forward with their claims if they are already struggling with the complexity and stress of deciding to take legal action.</p> <p>The applicant choice model erects these barriers under the guise of flexibility, without offering any concomitant advantage over providing either of the individual options in isolation.</p> <p>Further, an applicant may be disadvantaged by being locked into the choice they make at the start of proceedings. For example, an applicant who does not understand the strength of their case may be intimidated into thinking they could be liable for costs after receiving a Calderbank offer, only to later win their case and be denied the opportunity to recover their legal costs.</p> <p>An applicant choice model offers the dubious benefit of choice between two imperfect cost models that have their own disadvantages, while also creating a risk that applicants will make the wrong choice. Applicants would be better served by a cost model being implemented that is advantageous to them overall, namely the equal access cost model.</p>

A case study in cost neutrality with discretion

The below deidentified and anonymised case study involves a WA worker who made a complaint to WA's Equal Opportunity Commission (**EOC**). If matters are not resolved through the EOC's complaints process, they may proceed to the State Administrative Tribunal (**Tribunal**) and the following costs provisions apply:¹

¹ *State Administrative Tribunal Act 2004* (WA), s 87.



87. Costs of parties and others

- (1) Unless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, *parties bear their own costs in a proceeding of the Tribunal.*
- (2) Unless otherwise specified in the enabling Act, *the Tribunal may make an order for the payment by a party of all or any of the costs of another party or of a person required to produce a document or other material on the application of the party under section 35.*

...

[Emphasis Added]

Circumstances in which costs may be awarded by the Tribunal are not exhaustively defined, but may include:

- where a party's unreasonable or inappropriate conduct has resulted in costs being incurred unnecessarily; or
- where a party's case has been found to be weak or without merit.

Evelyn's story

Evelyn is a young worker who worked in a casual administrative role in regional WA for a large resource company.

Throughout her employment, she was sexually harassed by her manager. Among other behaviour, her manager told her that he loved her, made comments about her body in front of her co-workers, invited her to stay at his residence, showed her pornographic images and videos, and sexually propositioned her. When she rejected his advances, he retaliated by threatening to dismiss her, telling her that she was dismissed, and sending her disturbing messages and images.

Evelyn made a complaint to the EOC. During the EOC's investigation and conciliation of the complaint, Evelyn's former employer made Calderbank offers that she originally rejected due to them containing very modest settlement sums. However, her former employer persisted and told Evelyn said that if Tribunal proceedings were initiated, they would seek a costs order against her on the basis that her refusal of their Calderbank offer was unreasonable.

Evelyn wanted to take the matter further but felt that the risk of an adverse cost order was too daunting. This was exacerbated by the fact that she was not able to afford legal representation and she would have been unable to recover her legal costs, given the cost neutral jurisdiction of the Tribunal.

Evelyn eventually acquiesced to the pressure applied by her employer and their lawyers despite the settlement sum barely covering the economic losses she had already realised as a result of the workplace sexual harassment she experienced.

Further comments

In this review, it is vital to keep in mind that a person who has experienced sexual harassment faces multiple, intersecting, aggravating factors that may prevent them from making a claim. A broad, overarching factor is a general loss of trust, not only in systems that are designed to help, like the legal system, but also a loss of hope and trust that anyone is on their side.

In order to create a cost protection model that removes the cost barrier without erecting new, more difficult barriers, the government needs to consider the mental state of a person who may still be recovering from sexual harassment one or two years after the event.

Submission feedback – LEAP member

“In managing my PTSD post-assault, a massive part of that journey was managing my loss of control and the damage to my capacity to trust. After harassment, belief that a favourable or positive outcome is possible diminishes greatly. Even now, I struggle to believe that positive outcomes are possible in my day-to-day life and general functioning, let alone that a legal team can achieve positive outcomes for me.”

Thank you for taking the time to consider Circle Green’s submission. If we can provide any further information, please contact Heidi Guldbaek, Workplace Respect Project Manager, or Matthew Giles, Lawyer – Workplace, on (08) 6148 3660 or at workplace.admin@circlegreen.org.au.

Yours faithfully

Circle Green Community Legal

Circle Green Community Legal

