Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022: Costs protection provisions and access to justice

Dear Committee

Thank you for the opportunity to make this brief submission, in relation to the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 ("the Bill"). I lead the Employment and Discrimination Law practice at Shine Lawyers, where we represent individuals (not employers). Prior to joining Shine Lawyers, I practised in the UK in the same field, primarily acting for individuals, but also some employer-side work. I was also a longstanding Trustee/Director of the Fawcett Society, the leading campaign for gender equality in the UK. I make this submission in a personal capacity, based on my experience in the systems operating in both countries; it represents my views alone.

Costs Protection Provisions and Access to Justice

While I welcome other elements of the Bill, I make this submission in relation to the proposed amendments to the Costs Protections provisions at Schedule 5. Unfortunately, and directly contrary to their intention, I am of the view that these are likely to be problematic from an **access to justice** perspective. Consequently, I anticipate that these are likely to deter rather than encourage applicants to pursue legal action in the federal courts.

I note that, at paragraphs 33-37, the Explanatory Memorandum makes its intention to remove deterrence for applicants clear, providing as follows:

> *Costs protection provisions*
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> *33. The Bill would insert a cost protection provision in the AHRC Act to provide greater certainty to parties during court proceedings in relation to costs. This amendment would achieve the policy objective of recommendation 25 of the Respect@Work Report.*
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> *34. The Respect@Work Report heard that the risk of adverse cost orders acts as a disincentive to applicants considering pursuing their sexual harassment matters in the federal courts. It was noted the current practice, in which costs follow the event (despite a broad judicial discretion to award costs in any manner seen fit), means that applicants may be liable for their own costs, as well as those of the other party, if they are unsuccessful. This may deter applicants from initiating court proceedings and creates access to justice concerns, particularly for vulnerable members of the community. In response, the Respect@Work Report recommended that a cost protection provision be inserted in the AHRC Act to provide greater certainty for applicants.*
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> *35. The Bill adopts a 'cost neutrality' approach and would provide that, as a default position, each party would bear their own costs in an unlawful discrimination proceeding. However, the courts would retain discretion to depart from this default position and make cost orders where they consider it just. In considering whether to depart from the default position, the federal courts must have regard to a number of factors, including the financial circumstances of each of the parties to the proceedings and whether any party to the proceedings has been wholly unsuccessful in the proceedings.*
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> *36. This amendment would provide applicants with a greater degree of certainty over the costs they would be required to pay if they commence legal proceedings,*

while also providing flexibility for the federal courts to award costs for either party depending on the circumstances.

37. This approach differs from the model recommended in the Respect@Work Report, which proposed an amendment based on section 570 of the Fair Work Act. The Fair Work Act provides that costs may only be ordered against a party if the court is satisfied that the party instituted the proceedings vexatiously or without cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs. The Bill adopts a 'cost neutrality' approach in line with the Commission's updated position on costs in the Commission's Free and Equal Position Paper. This approach is preferred because it provides applicants and respondents with greater certainty around the costs they would be required to pay if they commence legal proceedings. It also provides greater flexibility to award costs to successful parties if it would be appropriate to do so, rather than only considering the conduct of the parties.

And further, that the proposed revision to s46PSA of the Australian Human Rights Commission Act 1986 is as follows:

46PSA Costs

(1) Subject to subsection (2), in proceedings under this Division against a respondent to a terminated complaint, each party is to bear that party's own costs.

(2) If the court concerned considers that there are circumstances that justify it in doing so, the court may make such order as to costs, whether by way of interlocutory order or otherwise, as the court considers just.

(3) In considering whether there are circumstances justifying the making of an order under subsection (2), the court concerned must have regard to the following matters:

(a) the financial circumstances of each of the parties to the proceedings;

(b) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission);

(c) whether any party to the proceedings has been wholly unsuccessful in the proceedings;

(d) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle:

(i) the proceedings; or

(ii) the matter the subject of the terminated complaint;

and, if so, the terms of the offer;

(e) whether the subject matter of the proceedings involves an issue of public importance;

(f) any other matters that the court considers relevant.

Note: Section 37N of the Federal Court of Australia Act 1976 and section 191 of the Federal Circuit and Family Court of Australia Act 2021 also provide for matters to be taken into account in awarding costs.

(4) In the case of a representative application, subsection (2) does not authorise the court concerned to award costs against a person on whose behalf the application is made other than the person who made the application.

Cost Rule implications for funding in the UK

In the UK, work-related discrimination cases are heard in the Employment Tribunal system, where the costs rule is similar to the costs rule under s570(2) of the Fair Work Act 2009 (Cth), in that each party typically bears their own costs, regardless of whether they win or lose their case. Exceptionally, costs are awarded for unreasonable conduct, if the case was frivolous or vexatious, or misconceived. The

impact of this, in my experience, was that legal representation in discrimination cases was available only to those with deep enough pockets to bear the costs of litigation (in what can be both legally and factually complex cases). In the UK, this typically meant applicants on very high salaries (who could privately fund, and who may stand to recover significant damages for loss of earnings), or whose trade union membership or litigation insurance funded their litigation costs.

Owing to the costs rule, unlike in general civil litigation where the costs rule is that costs follow the event, no-win-no-fee (conditional costs agreements) could not typically be offered, even in meritorious cases, since there was no certain mechanism for costs recovery. Consequently, no-win-no-fee agreements were generally limited to damages-based-agreements, which could only realistically be offered only in high value cases (typically those for applicants on very high salaries, as noted above).

Contrasting the costs rule and funding mechanisms in Australia

It has therefore been highly satisfying to be able to offer no-win-no-fee conditional costs agreements to meritorious applicants in Australia – regardless of income level – alongside my colleagues in other civil practice areas aimed at ordinary everyday Australians, in the certain knowledge that the usual civil costs rule will apply. Where applicants are supported by pro bono services up to a certain stage (but constrained from progressing further for capacity reasons), we are then able to fund their matters through litigation also, subject to merits.

Unfortunately, the proposed revision to s46PSA removes that certainty, on which such funding arrangements apply (and which also informs out-of-court settlements, through which cases are usually resolved). Instead, the proposal will start from the position that each party is to bear their own costs, save in exceptional circumstances at the discretion of a court to determine. While we understand that the court must have regard to certain factors, the litigants cannot know in advance what is likely to be determined, and the certainty upon which no-win-no-fee agreements depend is lost. One unintended consequence might therefore be pressing on with litigation to determine costs, when the case might otherwise be settled at an earlier stage.

More significantly, the question may be whether such cases commence at all. In my view, the inevitable consequence will be less availability of such funding mechanisms, which may (as in the UK) need to be linked to high value damages in order for solicitors to offer no-win-no-fee agreements. This is particularly a concern here where individual applicants' discrimination cases are not generally otherwise funded by trade unions or litigation insurance. The likely impact is therefore a significant reduction in access to justice for meritorious applicants who are low/middle-income earners. Notwithstanding the concerns rightly expressed about the risk of adverse costs orders, given that the clear intention of the proposal is to remove barriers faced by meritorious applicants, it would be entirely counter-productive if these changes result in limiting those who proceed to those who are already well-resourced.

Alternative potential solution

A simple alternative one-way costs-shifting mechanism would appear to be a solution to avoid these problems, whereby applicants would recover costs if successful, but respondents only if the proceedings had been instituted vexatiously or without reasonable cause, or the claimant's unreasonable acts or omission caused another party to incur costs. That would provide solicitors with the necessary certainty to continue to offer no-win-no-fee agreements, based on merit (not income level). It would also deter unmeritorious claims, and protect respondents from unreasonable conduct. In these circumstances, it would also be expedient to settle matters at an early stage, rather than have these unnecessarily run to final hearing in order to determine costs.

Supplementary: allocation practices - duty of care and trauma

Although not the primary focus of this submission, I would be grateful if I might take the opportunity to raise an issue that is increasingly causing trauma for applicants, namely the delays to allocation in the Australian Human Rights Commission (the Commission).

At present, our sexual harassment matters are taking upwards of 8 months merely to be allocated to a conciliator (one is currently ten months since filing, as yet unallocated). The delays in our cases appear to be longer the more serious the sexual assault was in the case.

Our clients are unable to move on in these situations, adversely impacted by the devastating impacts of their trauma as well as financial hardship, and the conciliation when it eventually comes is typically not then taken very seriously in terms of achieving resolution, given the delay since the incidents occurred (and they are of course not compulsory to attend). We find that conciliations in these circumstances are typically unproductive, with the respondents having long moved on, and all that has been achieved is an inordinate delay before we are able to file court proceedings. This is not just an issue of "justice delayed, justice denied", although certainly true. Sadly, we find that our clients' condition and prognosis worsens as a direct consequence of the delays, along with their faith in the justice system and the original trauma and consequences deepen further.

It would appear that the Commission is under-resourced for its present functions, and while the shift to the prevention in the Bill is welcome, along with the wide-range of additional powers and functions for the Commission, my intention in highlighting this is so that attention may also please be given to ensuring sufficient quality staffing so as to satisfy a mechanism whereby all discrimination matters are allocated within say 3 months, with a conciliation conference listed within say 4 months of the original complaint filing?

Thank you for your time and attention in considering this submission. My contact details appear below.

Yours sincerely

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