AUSTRALIAN DISCRIMINATION LAW EXPERTS GROUP

Submission of the Australian Discrimination Law Experts Group

in response to the

Legal and Constitutional Affairs Legislation Committee inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

13 December 2023

Australian Discrimination Law Experts Group

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group ('ADLEG'), a national network of legal academics with significant experience and expertise in anti-discrimination and equality law and policy.

This submission addresses the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 relating to costs in Commonwealth discrimination cases.

This submission may be published.

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Summary

This submission addresses the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 ('the Bill'), which proposes reforms to provisions for costs orders in federal discrimination cases.

In April 2023, ADLEG made an extensive and detailed submission on the Attorney-General's Department's 2023 *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* ('*Consultation Paper*'). We attach at Appendix 1 a copy of that submission in full, to provide the Committee with further background and context.

The Bill reflects four of ADLEG's nine recommendations (Recommendations 1, 2, 3 and 5) from that submission:

- That an asymmetrical costs regime is adopted for federal discrimination cases.
- That the application of the 'costs follow the event' rule to federal discrimination cases cease.
- That the 'hard costs' model should not be extended to the federal discrimination system.
- That the costs model adopted for federal discrimination cases recognise the significant power differentials prevalent in discrimination cases; this is best achieved through the adoption of the asymmetrical costs model.

ADLEG's expert views that led to these four recommendations that have been adopted in the Bill are set out in the attached submission.

The Bill does not reflect two other of ADLEG's recommendations (Recommendations 6 and 9); we address those below and urge the Committee to make recommendations in the same terms.

A further three of ADLEG's recommendations (Recommendations 4, 7 and 8) would not be reflected in legislation such as the Bill but would be adopted in law and policy elsewhere. The Government has not given an indication of its intentions in relation to those recommendations; we address them below and urge the Committee to make recommendations in the same terms.

Accordingly:

ADLEG recommends to the Committee that it recommend passage of the Bill with the following amendments:

1. exclude consideration of formal and informal offers of compromise in relation to any discretion to award costs, and
2. make provision for a three- or five-year review of the operation and effectiveness of the amendments in achieving their objects, including through case data analysis.

Further, ADLEG recommends to the Committee that it recommend the following action be taken by the Government:

3. introduce measures to ensure legal representation for complainant parties, such as enhancing the capacity of the Australian Human Rights Commission to provide counsel assisting in hearings, and providing targeted funding for grants of legal aid, and for community legal centres that provide court representation, particularly those with specialist discrimination law practices.

4. conduct a similar inquiry in respect of remedies under discrimination law to ensure that a full range of remedial options is available and reflects the often systemic nature of discrimination experienced by the most marginalised of Australians, and

5. legislate to limit applications for strike out of proceedings to matters in which the President of the Australian Human Rights Commission had mandatorily terminated the complaint under section 46PH(1B) or (1C) of the *Australian Human Rights Commission Act 1986* (Cth).

We address these five recommendations below.

1. Offers of compromise

In its submission to the Attorney-General's Department's 2023 *Consultation paper*, ADLEG proposed (Recommendation 6) that the Bill make provision in relation to what is known as a Calderbank offer, or a Calderbank letter.

A Calderbank offer is an offer of compromise: one party offers to settle a legal dispute on the basis that, if their offer is not accepted and the proceedings result in a verdict that is less than the sum that had been offered, the offeror will be entitled to their legal costs from the time of the rejected offer. The Federal Court Rules make provision for offers of compromise (Rule 25.14), and a Calderbank offer is simply an offer of compromise that does not comply with the Rules (*Richardson v Oracle Corporation Australia Pty Limited* (No 2) [2013] FCA 359 [31].

ADLEG's submission to the Committee relates to offers of compromise, however made.

It is not possible to accurately assess the prevalence of offers of compromise in discrimination litigation, but Thornton, Pender and Castles identify that their data show 10% of successful complainants have been ordered to pay the respondents' costs.[1]

The risk of an offer of compromise being higher than the amounts awarded in damages is always a live possibility in discrimination, given the generally low range of damages awarded (particularly in cases other than sexual harassment) and the difficulty of predicting what amount a court will award.[2] At the state and territory level the damages awards are similarly low, and generally lower in discrimination claims than sexual harassment claims.[3] This risk of low damages awards is another factor that complainants, even where they receive legal advice, must take into account in determining whether or not to settle or proceed to hearing. Such offers are made in cases under state and territory laws even where 'soft costs' rules apply and have a chilling effect on complainants who face the conflicting messages of a generally costs-neutral jurisdiction and an early threat of a costs order even if successful in their claim. Where a claimant is unrepresented it becomes even more difficult for them to assess (a) their likelihood of success, and (b) the likely level of any damages awarded and therefore the impact of the offer of compromise.

A costs consequence flowing from an offer of compromise may be suitable for commercial disputes between parties that have relatively equal resources and bargaining power. In cases involving a substantial inequality of both power and resources, such as discrimination cases, offers of compromise operate oppressively. They allow a respondent to leverage its resources and emotional detachment to impose fear and uncertainty on a complainant in order to deter them from continuing with their claim or to accept a low offer of settlement. In addition, the

1 Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and costs in sexual harassment litigation: A doctrinal, qualitative and quantitative study*, Australian National University, 2022, 13.
2 Ibid, 21–27.
3 Ibid, 27–34.

better-resourced party in a discrimination claim may be better able to research the (limited) court decisions to evaluate likely damages, informing the offers made.

Recommendation 1: That the Committee recommend that the Bill be amended to expressly exclude consideration of offers of compromise in relation to any discretion to award costs. For example, section 46PSA(5) of the Bill could be qualified by a phrase such as 'notwithstanding FCR 25.14 and any offer of compromise that was made'.

2. Review

In its submission to the Attorney-General's Department's 2023 *Consultation paper*, ADLEG proposed (Recommendation 9) that the Bill provide for a three- or five-year review of the operation and effectiveness of the Bill in achieving its objects.

ADLEG is concerned to ensure that any reforms in this area of discrimination law are reviewed to identify whether or not they have achieved their intended effect. The Committee would have a similar concern. This concern would most appropriately be addressed through a statutory review to be held and completed within a specified time that expressly includes consideration of data that can be compared to those examined by Thornton, Pender and Castles.

Provision for the review of an Act's operation is common in Commonwealth legislation; among many examples, see most recently section 185 of the *Recycling and Waste Reduction Act 2020* (Cth) and section 18 of the *National Emergency Declaration Act 2020* (Cth), and Part 6 of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) (the '*Premises Standards*'). The framing of the review requirement in the *Premises Standards* is preferered as it ensures the review is completed in a timely way.

Recommendation 2: That the Committee recommend that the Bill be amended to make provision for a three- or five-year review of the operation and effectiveness of the amendments in achieving their objects, including through case data analysis.

3. Access to legal representation

In its submission to the Attorney-General's Department's 2023 *Consultation paper*, ADLEG proposed (Recommendation 4) that measures be taken to ensure legal representation for complainant parties.

ADLEG's argument in support of this recommendation is set out in full in the submission at Appendix 1 (from page 13). In short, ADLEG submitted that there is a clear relationship between representation and outcomes in the cases.

Banks's analysis of all federal first-instance discrimination case decisions up to the end of 2018 shows that in the Federal Circuit Court 39.0%[4] of complainants were represented while 96.5% of respondents were represented. In contrast, in the (then) Human Rights and Equal Opportunity Commission, 54.3% of complainants were represented and 76.4% of respondents were represented.[5]

Further, data show that unrepresented complainants have a lower rate of success than represented complainants, with the differences in the Federal Court system being significantly greater than in the (then) Human Rights and Equal Opportunity Commission

Because of the clear relationship between representation and outcomes in these cases, ADLEG makes the following recommendation:

Recommendation 3: That reforms to the costs model must be accompanied by significant measures to ensure legal representation for complainant parties. Such measures could include enhancing the capacity of the Australian Human Rights Commission to provide counsel assisting the court in hearings, providing targeted funding for grants of legal aid, and for community legal centres that provide court representation, particularly those with specialist discrimination law practices.

4 Robin Banks, *A rose is a rose: But not all discrimination smells the same: An exploration of the capacity of the psychology of stigma, prejudice and discrimination to enhance discrimination law*, PhD Thesis, University of Tasmania, 2023, 118, Table 5–9. Of those 55 complainants represented in case determinations in the Federal Circuit Court, five involved representation by community legal centres, and three involved representation under section 46PO(1)(c) of the *Australian Human Rights Commission Act 1986* (Cth) by non-legal representatives.

5 Ibid.

4. Remedies

In its submission to the Attorney-General's Department's 2023 *Consultation paper*, ADLEG proposed (Recommendation 7) that the Government conduct an inquiry into remedies available under discrimination law to ensure that the full range of remedial options is available and reflects the often systemic nature of discrimination experienced by the most marginalised of Australians.

ADLEG's argument in support of this recommendation is set out in full in the submission at Appendix 1 (from page 18). In short, ADLEG submitted that the chronically low level of damages awards in discrimination matters compounds the negative effects of conventional costs models.

In addition to low compensation awards, the range of remedial orders made by courts in Australia is very narrow, failing to ensure that the systemic nature of much discrimination or the persistence of discrimination in certain industries or by particular entities (including government) is addressed.

Recommendation 4: That the Committee recommend that the Government conduct a similar inquiry in respect of remedies under discrimination law to ensure that the full range of remedial options is available and reflects the often systemic nature of discrimination experienced by the most marginalised of Australians.

5. Procedural complexity and summary dismissal applications

In its submission to the Attorney-General's Department's 2023 *Consultation paper*, ADLEG proposed (Recommendation 8) that the Government legislate so as to limit strike-out applications only to proceedings in relation to which the President of the Australian Human Rights Commission had mandatorily terminated the complaint under section 46PH(1B) or (1C) of the *Australian Human Rights Commission Act 1986* (Cth).

It can be observed that there is an increasing number of applications for summary dismissal and of other procedural steps in discrimination cases, particularly at the federal level. At the federal level, less than ten percent of decisions of the (then) Human Rights and Equal Opportunity Commission dealt with applications for dismissal without full hearing (2.7% where the complainant was represented, and 8.8% where the complainant was unrepresented). These applications for dismissal were successful in 45.5% of applications where the complainant was represented and 69.3% were unrepresented.[6]

In contrast, between nine percent and 23% of decisions of the Federal Circuit Court of Australia involve such applications (9.2% where the complainant was represented and 22.7% where the complainant was unrepresented. These applications were successful in 69.2% of applications where the complainant was represented and 93.8% where unrepresented. Banks's analysis of Canadian federal discrimination cases indicates that between 2009 and the present 42.4% of complaints were dismissed without hearing (including through abandonment or failure to appear at hearing). Where the complainant was represented, 37.5% of complaints were dismissed without hearing, and where unrepresented, 52.6% were dismissed.

Even when unsuccessful, such applications are likely to heighten the anxiety of litigation for complainants. They increase the cost of continuing the claim and the risks of losing, in view of both the prevailing costs rules and the low and uncertain levels of damages available.

Recommendation 5: That the Committee recommend that the Government consider legislating to limit applications for strike out of proceedings to matters in which the President of the Australian Human Rights Commission had mandatorily terminated the complaint under section 46PH(1B) or (1C) of the *Australian Human Rights Commission Act 1986* (Cth).

We trust that this submission is helpful to the Committee. We are happy to answer any questions about the submission or other related issues, and to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by contacting Dr Robin Banks

[6] Ibid, 119–120, Tables 5–11, 5–12 and 5–13.

APPENDIX 1
ADLEG Submission to the Attorney-General's Department's 2023 *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws*

Asymmetrical costs regime for federal discrimination cases

ADLEG strongly supports costs reform. Costs – and fear of costs – significantly deter claimants from using existing legal mechanisms to address discrimination and inequality, particularly under federal discrimination law. Discrimination complaints are public interest matters; there is a public interest in complaints being able to progress to the courts. This public interest stems from the utility of public pronouncements regarding the application, scope and operation of prohibitions of discrimination. In the absence of court judgments, there is little scope for development of the common law regarding the legislation, nor development of case-informed standards regarding compliance. Costs should be allocated accordingly.

The Attorney General Department's discussion paper defines the asymmetrical costs model as where:

> … if an applicant is unsuccessful, each party would bear their own costs. However, if an applicant is successful, the respondent would be liable for the applicant's costs.[1]

Drawing on extensive empirical research on age discrimination complaints in Australia and the UK, Blackham concludes that existing cost regimes deter claiming and limit access to justice for the most vulnerable claimants. Blackham therefore recommends the adoption of qualified, one-way costs shifting, such that claimants only can recover legal expenses.[2]

For the reasons set out below in relation to alternative models, ADLEG makes the following recommendation:

Recommendation 1: That an asymmetrical costs regime is adopted for federal discrimination cases.

1 The Consultation Paper, page 28.

2 Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) 232.

Alternative costs regimes for discrimination cases

Current costs regime

The current costs regime was introduced with the transfer of the jurisdiction to the Federal Court and Federal Magistrates' Court ('Federal Court system') in 2000 as a result of the jurisdictional decision in *Brandy v Human Rights and Equal Opportunity Commission*.[3] Prior to that, cases were determined by the (then) Human Rights and Equal Opportunity Commission which did not have power to award costs. At the time of the shift to the Federal Court system, concerns were identified by community legal centres and others about the effect on plaintiffs of the issue of costs being at the discretion of the court.[4] In contrast, it was argued that this change would make it easier for complainants to access legal representation because the availability of costs awards in favour of a plaintiff would facilitate 'no win no fee' representation.[5] It was also reported there were 'witnesses and submissions that supported the shift', but only one is referenced: the Australian Bus and Coach Association, whose submission suggested that the change would result in complainants having 'to closely examine the merits of their case before launching court actions'.[6]

In its 2004 review of the *Disability Discrimination Act 1992* (Cth) ('DDA'), the Productivity Commission noted a number of submissions about the effect of costs risks on complainants.[7] The Productivity Commission recognised that adverse costs risks have an impact in commercial litigant behaviour but observed that:

> … a distinction should be drawn between decisions based on commercial imperatives and individuals seeking redress for unlawful discrimination. Decisions about defending legislated human rights should not be overly influenced by the financial consequences of losing.[8]

The Productivity Commission recommended that:

> The [then] *Human Rights and Equal Opportunity Commission Act 1986* should be amended to require each party to a disability discrimination case to bear his or her own costs in the Federal Court and Federal Magistrates Court, subject to guidelines for cost orders based on the criteria in sections 117(3) and 118 of the *Family Law Act 1975*.[9]

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3 *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245 (23 February 1995).

4 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Human Rights Legislation Amendment Bill 1996* (Report, June 1997) [4.40]–[4.42].

5 Beth Gaze and Rosemary Hunter, *Enforcing human rights: An evaluation of the new regime* (Themis Press, 2010) 232.

6 Senate Legal and Constitutional Legislation Committee (n 6) [4.43]–[4.44].

7 Productivity Commission, Review of the Disability Discrimination Act 1992 (Report No 30, April 2004) vol 1, 368.

8 Ibid 369.

9 Ibid 392–96 and recommendation 13.4.

Effect of the costs regime on claimants

The concerns identified above were considered as part of Gaze and Hunter's research into the effect of the change of forum for federal discrimination cases from the Human Rights and Equal Opportunity Commission as a specialist tribunal to the federal court system. [10] They reviewed complaint statistics and interviewed parties to complaints in the 'old' and the 'new' systems as well as legal advisers in community legal centres and private practice. This work documented an immediate and substantial fall in the number of claims brought under federal anti-discrimination law after the decision in Brandy's case, and especially after the change of forum, shown in Figure 1below.[11] Figure 2 (from Banks's study[12]) shows the total complaints received by the Australian Human Rights Commission, and the numbers of complaints proceeding to determination under each of the federal discrimination laws, compared to the number of first instance decisions finalising complaints in the both AHRC and the Federal Court system.

Figure 3 (Banks[13]) shows that despite the recovery in the numbers of complaints made after 2004–05, there was a much less notable recovery in the number of cases reaching final decision in the relevant federal court. The peak period for case determination was in the period between 1996 and 2000, with the numbers dropping away after that. Gaze and Hunter also documented the rise of fear of a costs order as a major factor in deterring litigants from proceeding to court after failed conciliation in the federal system,[14] and influencing complainants' and potential complainants' choices to use the state or territory anti-discrimination system instead of the federal system.[15]

10 Gaze and Hunter (n 7).

11 Ibid 55, figure 3.1.

12 Robin Banks, 'A rose is a rose: But not all discrimination smells the same: An exploration of the capacity of the psychology of stigma, prejudice and discrimination to enhance discrimination law' (PhD Thesis, University of Tasmania, 2023) 108, figure 5–1.

13 Generated from data compiled for Banks (n 14).

14 Gaze & Hunter (n 7) 80, table 4.3 shows that in the case of withdrawal of a claim after failed conciliation before going to court, fear of costs was not an issue under the old system but was a dominant factor in the new system, along with 'couldn't afford a lawyer for the hearing' and 'didn't want to represent self at the hearing.'

15 Ibid 103–4.

Federal anti-discrimination system 1981–2019: first-instance case decisions finalising complaints

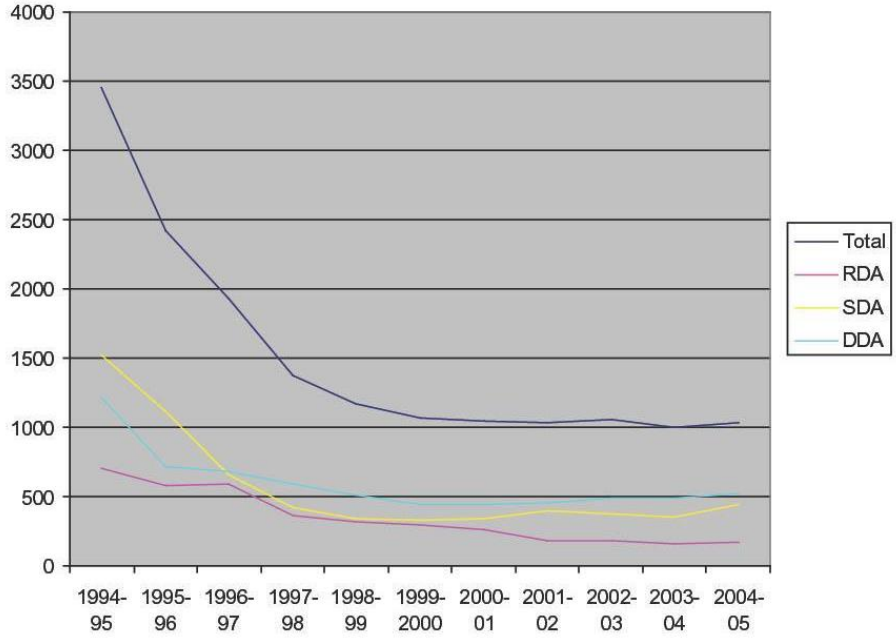

Figure 1: Complaints lodged in the federal anti-discrimination system 1994–2005 by Act

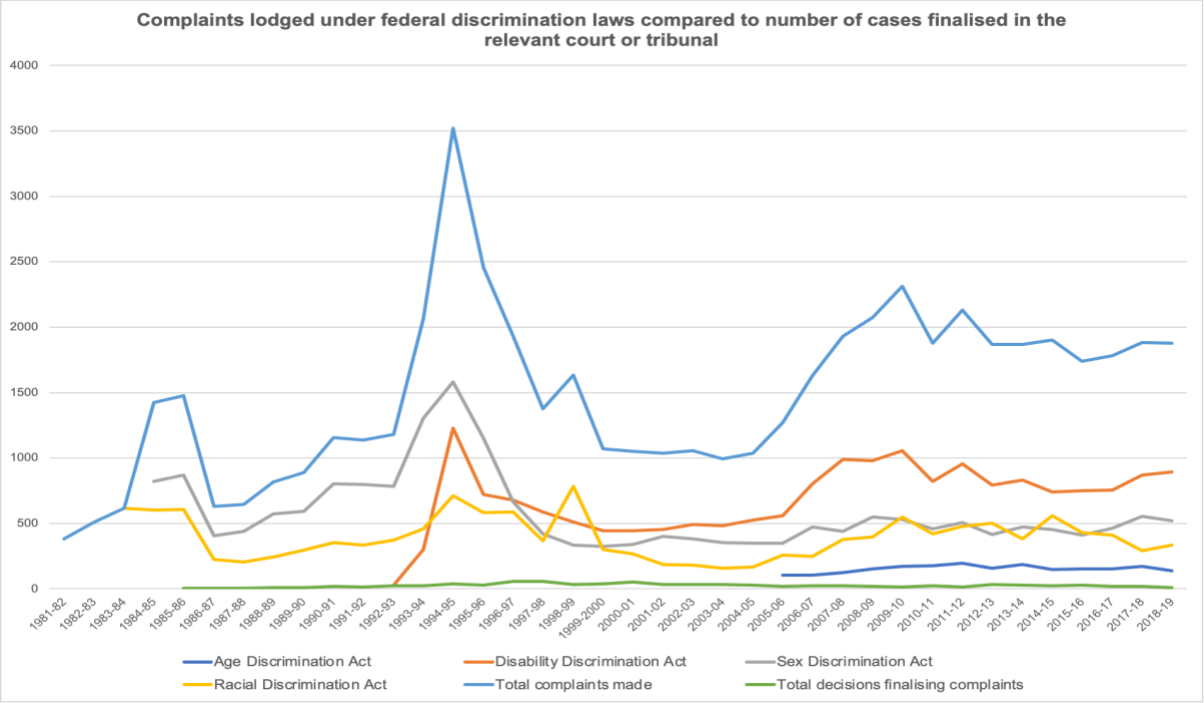

Figure 2: Complaints lodged in the federal anti-discrimination system 1981–2019, and first-instance case decisions finalising complaints over the same period

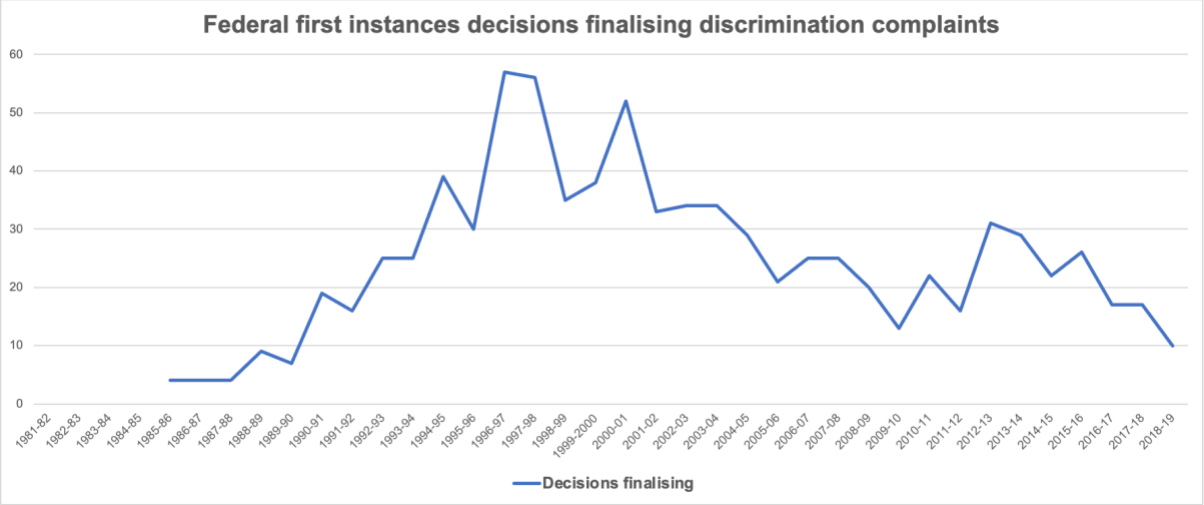

Figure 3: Federal anti-discrimination system 1981–2019: first-instance case decisions finalising complaints

Gaze and Hunter concluded that the qualitative data demonstrated that 'the risk of an adverse costs order … operated as a major disincentive for a significant minority of complainants'.[16] Further:

> Our results identify continuing concerns about the lack of enforcement of federal anti-discrimination law, although the causes of that lack of enforcement have changed. Instead of the formal, constitutional lack of enforceability that affected HREOC's decisions, the current lack of enforcement results from the practical difficulty for complainants in successfully bringing legal proceedings in the federal jurisdiction.[17]

In more recent interviews, members of equity-seeking groups[18] identified the adverse costs regime in the Federal Court system as 'a massive disincentive to bringing any federal complaint at the moment' and that 'in concert with the "time and complexity in a discrimination case [the option of a federal complaint] just doesn't stack up to the levels of compensation'.[19] Banks further reports that a number of interview participants identified the need for reforms to costs orders 'with all but one suggesting discrimination law at the federal level should move to a non-costs approach'.[20]

Impact on enforcement of the law

Discrimination laws are enforceable primarily by legal action by individuals affected, who are generally likely to be disadvantaged and lack resources that would allow them access to the expert legal representation necessary to operate in this complex area of law or allow them to

16 Ibid 235.

17 Ibid 234–5.

18 Banks (n 14) 25: '... this term is used to describe those groups who have successfully argued that a particular aspect of their identity has and continues to result in them experiencing discrimination, both as individuals with that identity, as a group. Through this advocacy they have achieved protection for members of their identity group in discrimination law…'

19 Ibid 261, directly quoting interview participants.

20 Ibid 282.

take the risk of a negative costs award if they lose. Failure to address this problem leaves federal discrimination laws virtually unenforced; this can be understood as condoning the continuation of discrimination.

A major concern about the very limited number of discrimination matters litigated in the Federal courts since 2000 is the lack of authoritative court decisions interpreting the law, which further deters litigation due to the uncertainty involved. While settlement is often a desirable outcome for the parties to a claim, court decisions which clarify the effect of the law are beneficial for the wider public, providing guidance to both duty holders and potential claimants about the merits of their claims.[21] Such decisions have the potential to inform the development of standards of behaviour that minimise future unlawful discrimination in contravention of legislative prohibitions, which serves the objectives of the legislation. As a result of the limited number of litigated complaints, court decisions on both liability and quantum of damages can be unpredictable in discrimination law. While adopting the standard costs regime may have benefited a small subset of more privileged complaints, in general it has not solved the problem of providing access to legal advice and representation for the bulk of complainants. Because this undermines enforcement of the law, it is necessary to consider alternative mechanisms to resolve this problem.

Example: Asymmetric costs regime under the Civil Rights Act 1964 *(US)*

An asymmetrical costs regime is well established in the US civil rights system as well as in some public interest areas of Australian law, and ADLEG argues that now is the appropriate time to implement this alternative in Australia. In the USA, the basic costs regime is that costs awards are not made, and each party bears their own attorney fee costs. However, there are many exceptions, one of which is in civil rights claims.[22] For example, the provisions relating to discrimination in employment in Title VII of the *Civil Rights Act 1964* include:

> **(k) Attorney's fee; liability of Commission and United States for costs**
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.[23]

While this appears to allow costs awards in both directions, such exceptions 'were generally enacted to encourage private litigation to implement public policy. Awards of attorneys' fees are often designed to help to equalize contests between private individual plaintiffs and

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21 Jean R Sternlight 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401. Scholars such as Sternlight highlight that the cost regime under Australian federal discrimination law is particularly harsh and punitive to complainants who fail. Sternlight highlights that courts hearing discrimination cases in the United States award costs only in exceptional circumstances, and in the United Kingdom discrimination proceedings are generally conducted in tribunals, rather than through the courts.

22 Henry Cohen, Congressional Research Service Report for Congress 'Awards of Attorneys' Fees by Federal Courts and Federal Agencies' (Updated 20 June 2008) 2.

23 42 U.S. Code § 2000e–5 (k), *Civil Rights Act 1964* s 706(k) ('*Civil Rights Act 1964*').

corporate or governmental defendants. Thus, attorneys' fees provisions are most often found in civil rights, environmental protection, and consumer protection statutes.

The US Supreme Court has clarified that this provision creates a system of one-way costs shifting in order to ensure enforcement of the law. In *Christiansburg Garment Co v EEOC* 434 US 412 (1978) the Court confirmed that despite 'the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees,' in giving effect to a provision identical to section 706(k) it held that awarding costs to a successful plaintiff 'only to the extent that the respondents' defences had been advanced "for purposes of delay and not in good faith"' was a 'subjective standard' that did not properly effectuate the purposes of the counsel-fee provision concerned.' The Court continued:

> Relying primarily on the intent of Congress to cast a Title II plaintiff in the role of 'a "private attorney general," vindicating a policy that Congress considered of the highest priority,' we held that a prevailing plaintiff under Title II 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'[24]
>
> In *Albemarle Paper Co. v. Moody,* 422 U.S. 405, the Court made clear that the *Piggie Park* standard of awarding attorney's fees to a successful plaintiff is equally applicable in an action under Title VII of the *Civil Rights Act*.[25] 422 U.S., at 415.[26]

In *Christiansburg*, the issue was whether attorney's fees should similarly be awarded to a successful defendant in a discrimination claim. The Court confirmed that 'such awards should be permitted "not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'[27] Discussing the policy underlying this rule, the Court continued:[28]

> [18] … the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case, and that the term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him. In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
>
> [19] In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he

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24 *Christiansburg Garment Co v EEOC* 434 US 412 (1978) ('*Christiansburg*') at [7], citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400 at 402, 88 S.Ct. 964 at 966.

25 *Civil Rights Act 1964* (n 25). Ibid [8].

26 *Christiansburg* (n 26) [6].

27 Ibid [17].

28 Ibid [18]–[20].

> has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.
>
> [20] That § 706(k) allows fee awards only to prevailing private plaintiffs should assure that this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success. To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

In conclusion in respect of discrimination law cases in the Federal Court system, ADLEG **again submits** that the continuing application of the 'costs follow the event' rule significantly undermines the effective operation of federal discrimination law through creating a significant disincentive to challenging discrimination, a clearly identified public good.

Recommendation 2: That the application of the 'costs follow the event' rule to federal discrimination cases cease on the basis it significantly undermines the effective operation of federal discrimination law through creating a significant disincentive to challenging discrimination, a clearly identified public good.

Discrimination claims as public interest matters

There are four reasons why discrimination complaints are public interest matters.[29] Firstly, such complaints seek to vindicate a person's fundamental human rights.[30] Second, discrimination legislation has a 'beneficial' social purpose.[31] Third, such complaints and proceedings benefit the public (by promoting equality), and not merely the individual complainant. Finally, as mentioned above, many discrimination complainants are members of disadvantaged and vulnerable groups, who often cannot afford legal representation.

'Soft cost neutrality' model

The Discussion Paper defines the 'soft costs neutrality' model as where:

> … the default position would be that parties bear their own costs, but the court would retain a broader discretion (than under a 'hard cost neutrality' model) to award costs where they

29 See Bill Swannie, 'Corrective Justice and Redress under Australia's Racial Vilification Laws' (2021) 40(1) *University of Queensland Law Journal* 27, 59–63.

30 Federal discrimination legislation gives effect to Australia's obligations under international human rights treaties.

31 *Fetherston v Peninsula Health [No 2]* [2004 FCA 594 (23 April 2004) [9] (Heerey J).

> consider this would be in the interests of justice, in reference to a number of mandatory (but non-exhaustive) criteria.[32]

This is the costs model adopted in many state and territory tribunals. While it is less common for costs to be awarded in this model, research has found that the fear of costs being awarded, or uncertainty around the award of costs, may still deter claimants from proceeding to a tribunal.[33] Failing to award costs to successful claimants means that they will have to pay any legal or other costs out of any award they receive, and are likely to end up significantly undercompensated. There is limited incentive to enforce the law if after all the stress, time and effort of litigation, a successful claimant ends up out of pocket.

The research conducted by Margaret Thornton, Kieran Pender and Madeleine Castles reviews both federal and state/territory sexual harassment case outcomes and identifies that even in the model operating under state and territory discrimination laws, complainants remain at risk of facing an adverse costs order.[34] An unpublished analysis[35] of all first-instance discrimination cases under the *Anti-Discrimination Act 1998* (Tas) indicates that only one successful complainant has been awarded costs (3.7% of successful complainants), while 9 (18%) of successful respondents have been awarded their costs (three of these were cases in which the respondent was a government department).

'Hard cost neutrality' model

The Discussion Paper defines this model as where:

> … the default position … is that each party to a proceeding bears their own costs, except where either party has acted vexatiously or unreasonably… If either party has acted vexatiously or unreasonably, they can be ordered to pay the costs of the other party.[36]

Hard cost neutrality can disadvantage claimants who are legally represented, even when their claims are successful. Damages awards tend to be low, and rarely cover the full costs of legal proceedings and legal representation.[37] This may deter claimants from using legal mechanisms; and may deter practitioners' from accepting these sorts of cases, particularly on a contingency basis.

The experience of hard cost jurisdictions – like in UK Employment Tribunals – indicates that, even in this framework, costs orders are still granted disproportionately against claimants, not respondents. In Blackham's study of 1,208 UK Employment Tribunal decisions relating to age discrimination at work, costs orders were sought in 45 cases, and awarded in 35 cases. Costs

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32 The Consultation Paper, p 25.

33 Blackham (n 4) 231.

34 Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and costs in sexual harassment litigation: A doctrinal, qualitative and quantitative study* (Australian National University, 2022) 41.

35 Robin Banks, dataset compiled on first-instance decisions of the Tasmanian Anti-Discrimination Tribunal and its successor, the Tasmanian Civil and Administrative Tribunal.

36 The Consultation Paper, p 23.

37 Blackham (n 4) 159.

were mostly ordered in favour of respondents, and for significantly higher amounts (see Table 1).[38]

Table 1: Costs orders by recipient, case sample

	In favour of claimants (#)	In favour of respondents (#)
Number	8[1]	27
	(£)	**(£)**
Median	622.50	4,000.00
Minimum	160.00	230.00
Maximum	2,138.40	20,000.00

This suggests that 'hard' costs neutrality models still tend to favour respondents. We note that the hard costs neutrality model has mainly been used in tribunals, where lower formality, specialisation and less strict rules of evidence can reduce the costs of legal representation compared to court proceedings. The 'hard' costs model is used in UK employment tribunals, and in Australian state and territory anti-discrimination systems, by civil and administrative tribunals. Where it is applied in court proceedings, for example under s 570 of the *Fair Work Act 2009* (Cth), it operates to allow individuals to access courts where a tribunal is not available for constitutional reasons, but that occurs in a context where the law is well litigated and clarified, and where a range of advice and representation is available to claimants and respondents, with a publicly funded regulator who can bring litigation where necessary to clarify the law.

Recommendation 3: That the 'hard costs' model should not be extended to the federal discrimination system where the features identified in relation to litigation under the *Fair Work Act 2009* (Cth) are not available.

'Applicant choice' cost model

The discussion paper defines this model as where:

> … at the outset of court proceedings an applicant would be able to elect one of two options as to how costs are resolved. They could choose either a 'costs follow the event' model (whereby the unsuccessful party has costs awarded against them) or a 'hard cost neutrality' model (whereby each party bears their own costs, unless a party acts unreasonably or vexatiously).[39]

38 Ibid 232, table 6.10.

39 The Consultation Paper, p 4.

ADLEG expresses concern at this model; discrimination laws already require claimants to make a number of complex decisions in initiating a claim. Claimants may lack the knowledge and expertise to make these sorts of decisions at the outset of court proceedings. Further, unrepresented claimants may later gain representation, meaning their initial choice becomes inappropriate. Overall, this model is likely to place additional stress on claimants, in an already stressful context, and will not improve access to justice.

Other related issues

In considering the issue of costs, it is difficult to separate this from other issues that affect discrimination case litigation. First and foremost is the very nature of these cases and of the parties. In this regard, the public good of addressing discriminatory conduct and its negative effects on society are highly relevant, as is the power imbalance that is almost inevitably a feature of a discrimination law system that is reliant on individuals pursuing complaints. Other issues include the use of commercial litigation strategies in discrimination law cases, including, for example, Calderbank offers, security for costs applications and other interlocutory proceedings, and the levels of damages and the ongoing effects of caps on damages. An approach that has had limited use but could enhance the effectiveness of discrimination law actions should there be no changes to the current 'costs follow the event' rule is the discretionary power of courts to cap the costs payable in such litigation.

Each of these, other than costs caps, is explored briefly below.

Power imbalances: Nature of parties and access to legal representation

Factors that are of central relevance to the issue of costs are the significant power imbalance that very commonly exists between the parties in discrimination cases, and the exacerbation of that power imbalance through the nature of the parties and their access or otherwise to expert legal representation. As we note above, it was argued by some, at the time of the shift to the Federal Court system, that the move to a 'costs follow the event' model would improve access to legal representation for complainants. This has not, unsurprisingly, proven to be the case.

Margaret Thornton reflected on the issue of power imbalance in her seminal work, *The liberal promise: Anti-discrimination legislation in Australia*,[40] including noting the earlier work of Marc Galanter 'Why the "haves" come out ahead'[41] in which Galanter sets out 'reasons why corporate respondents are bound to be more successful in their use of the legal system than individual complainants'.[42] Galanter identified 'claimants who have only occasional recourse to the courts' as 'one-shotters or OS',[43] and those parties 'who are engaged in may similar litigations over time' as 'repeat players (RP).[44] In discrimination cases, the respondents are often such RPs with: 'knowledge and expertise … and an ability to play the field',[45] while those who make complaints of discrimination are almost always OSs, and are:

40 Margaret Thornton, *The liberal promise: Anti-discrimination legislation in Australia* (Oxford University Press, 1990) 175.

41 Marc Galanter, 'Why the "Haves" come out ahead: Speculations on the limits of legal change' (1974–75) 9 *Law and Society Review* 95.

42 Thornton (n 42).

43 Galanter (n 43) 97.

44 Ibid.

45 Thornton (n 42) 175. See discussion below about the nature of the parties.

> … [in a] substantially different position, for the OS lacks the resources of the RP. Whereas the RP can pursue a matter of principle all the way to the highest court of appeal invoking various delaying tactics as part of a calculated war of attrition, the cost of defending such strategies may be catastrophic for the complainant.[46]

Despite this being highlighted before the shift to the Federal Court system, this significant factor impacting litigation was given insufficient weight in the decision to proceed on a 'costs follow the event' basis for federal discrimination cases. These imbalances are seen in litigation in both federal and state/territory discrimination cases.

Even where a respondent is not a repeat player, it frequently has corporate structure and resources, usually has greater financial capability, and is able to insure against liability, and its legal fees are tax deductible. Claimants do not have these advantages. These inequalities characterise and define litigation between the parties in discrimination matters.

Access to legal representation

An analysis of all federal first-instance discrimination case decisions up to the end of 2018 indicates that there has been an increase in the gap between complainant and respondent representation, with 39.0%[47] of complainants represented in the Federal Circuit Court and 96.5% of respondents (a difference of over 55%). In contrast, the data for the cases determined by the (then) Human Rights and Equal Opportunity Commission indicates 54.3% of complainants were represented and 76.4% of respondents (a difference of just over 20%).[48] Table 2Table 2 below provides further details on these data:

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46 Ibid. A recent example is the sequence of cases involving complainants David Cawthorn and Paraquad Tasmania against developer Citta Group in relation to alleged inaccessibility of a new public open-air facility in Hobart, Parliament Square. The substantive matters in dispute have never been considered or determined by a tribunal or court. See: *David Cawthorn and Paraquad Association of Tasmania Incorporated v Citta Hobart Pty Ltd and Parliament Square Hobart Landowner Pty Ltd* [2019] TASADT 10 (28 November 2019); *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15 (23 December 2020); and *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 (4 May 2022).

47 Banks (n 14) 118, Table 5–9. Of those 55 complainants represented in case determinations in the Federal Circuit Court, five involved representation by community legal centres, and three involved representation under section 46PO(1)(c) of the *Australian Human Rights Commission Act 1986* (Cth) by non-legal representatives.

48 Ibid.

Table 2: Levels of representation

Jurisdiction	Total Judgments	Complainant represented		Respondent represented	
		N	% of hearings	N	% of hearings
FCA	303	199	65.7%	294	97.0%
HREOC*	407	221	54.3%	311	76.4%
FMCA	407	237	58.2%	389	95.6%
FCCA	141	55	39.0%	136	96.5%
TOTAL	1,258	714	56.6%	1,130	89.8%

HREOC complainant rep unknown	50	43.2%
HREOC respondent rep unknown	44	10.2%

There is a relationship between representation and outcomes in these cases, particularly in the Federal Court system. Unrepresented complainants have a lower rate of success than represented complainants with the differences in the Federal Court system being significantly greater than in the (then) Human Rights and Equal Opportunity Commission. Table 3 below presents these data, indicating that the rate of success of unrepresented complainants in the Federal Court system is, at its highest, less than 5%, compared to 26.4% in the Human Rights and Equal Opportunity Commission.[49] Overall, 33.5% of complaints have been upheld (at least in part) in federal discrimination cases. It is notable, however, that this percentage was 46.6% of cases determined by the (then) Human Rights and Equal Opportunity Commission; while it had dropped to 15% of cases determined by the Federal Circuit Court.[50]

Table 3: Relationship between complainant representation and outcome by jurisdiction

Jurisdiction	Complainant Represented	Complainant Unrepresented

49 Banks (n 14) 118, Table 5–10.

50 Banks (n 14) 109, Table 5–1.

	Upheld		Dismissed		Upheld		Dismissed	
	N	%	N	%	N	%	N	%
HREOC	124	58.8%	87	41.2%	34	26.4%	95	73.6%
FCA	27	41.5%	38	58.5%	1	1.4%	68	98.6%
FMCA	59	43.4%	77	56.6%	5	4.9%	98	95.1%
FCCA	10	33.3%	20	66.7%	1	1.9%	51	98.1%
TOTAL	**96**	**49.8%**	**135**	**50.2%**	**7**	**11.6%**	**217**	**88.4%**

There is a range of possible explanations for this difference, with the different procedure in the (then) Human Rights and Equal Opportunity Commission, with counsel assisting, being one possible reason that the lack of representation had less impact than in the Federal Court system. It is noted that in Canada, the Canadian Human Rights Commission has maintained a high level of involvement in the cases heard by the Canadian Human Rights Tribunal, originally as counsel assisting and more recently as an intervenor.[51]

Because of the clear relationship between representation and outcomes in these cases, ADLEG makes the following recommendation:

Recommendation 4: That reforms to the costs model must be accompanied by significant measures to ensure legal representation for complainant parties. Such measures could include enhancing the capacity of the Australian Human Rights Commission to provide counsel assisting in hearings, providing targeted funding for grants of legal aid, and for community legal centres that provide court representation, particularly those with specialist discrimination law practices.

Nature of the parties

It is important to consider the different nature of the parties in discrimination cases. It is almost always the case that claimants are individuals rather than organisations, with an occasional small group of individuals as complainants. In contrast, it is relatively rare for a case to involve only individual or several individual respondents.

51 *Canadian Human Rights Act*, RSC 1985, c H–6 (‘*Canadian Human Rights Act*’), in particular section 51: ‘In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint’. An analysis of all cases since 1 January 2009 indicates the Canadian Human Rights Commission has been listed as a party in 99.3% of cases. This does not mean it appeared in all hearings in relation to all these cases. As with Australian federal cases, complainants were legally represented in significantly less cases (54.9%) than were respondents (95.9%). The data indicates that the complaints were upheld (at least in part) in 54.4% of cases (this has increased to 60% in the last five years).

The following table (Table 4[52]) is based on case data from all federal first-instance discrimination decisions to the end of 2018. Only 2.1% of cases involve one or more organisational complainant(s), either alone or in conjunction with individual complainant(s). In contrast, 90.5% of cases involve one or more organisational respondent(s), either alone or in conjunction with individual respondent(s).

The fact that costs have been awarded to the government in 'soft costs neutrality' jurisdictions (see discussion above under 'Soft costs neutrality' model) highlights further the power imbalances that arise in discrimination cases.

Table 4: Nature of parties in federal discrimination cases[53]

	Federal Circuit Court		Federal Mag's Court		Federal Court of Australia		HREOC		TOTAL	
TOTAL	141		407		309		407		1257	
Complainants	#	%	#	%	#	%	#	%	#	%
Woman/en	68	48.2	214	52.6	140	45.3	232	57.0	654	52.0
Man/en	71	50.4	180	44.2	118	38.2	145	35.6	514	40.9
Mixed Group	2	1.4	8	2.0	38	12.3	19	4.7	67	5.3
Organisation	0	0.0	3	0.7	10	3.2	14	3.4	27	2.1
Other/Unknown	0	0.0	3	0.7	3	1.0	2	0.5	8	0.6
Respondents	#	%	#	%	#	%	#	%	#	%
Individual(s) with no org	13	9.2	35	8.6	13	4.2	59	14.5	120	9.5
Organisation	137	97.2	397	97.5	308	99.7	349	85.7	1191	94.7
Private for profit	67	47.5	185	45.5	101	32.7	166	40.8	519	41.3
Not for profit including faith orgs	12	8.5	41	10.1	34	11.0	40	9.8	127	10.1
Government/GBE	42	29.8	140	34.4	153	49.5	129	31.7	464	36.9
University	16	11.3	31	7.6	20	6.5	14	3.4	81	6.4

52 Data generated from dataset compiled for Banks (n 14).

53 Data generated from dataset compiled for Banks (n 4).

Recommendation 5: That the costs model adopted for federal discrimination cases recognise the significant power differentials prevalent in discrimination cases; this is best achieved through the adoption of the asymmetrical costs model.

Calderbank offers

The first-instance decision in *Richardson v Oracle Corporation Australia Pty Limited*[54] highlighted a feature of commercial litigation, the use of Calderbank offers, that has negative effects on discrimination cases, both at the federal and state/territory level. In that case, despite succeeding in her claim Ms Richardson was ordered to pay the respondent's legal costs because the amount awarded in compensation ($18,000) was less than a Calderbank offer made by the respondent. It is not possible to accurately assess the prevalence of Calderbank offers in discrimination litigation, but Thornton, Pender and Castles identify that their data shows 10% of successful complainants have been ordered to pay the respondents' costs.[55]

The risk of a Calderbank offer being higher than the damages awarded is always a live possibility in discrimination, given the generally low range of damages awarded, particularly in cases other than sexual harassment and the difficulty of predicting what amount a court will award.[56] At the state and territory level the damages awards are similarly low, and generally lower in discrimination claims than sexual harassment claims.[57] This risk of low damages awards is another factor that complainants, even where they receive legal advice, must take into account in determining whether or not to settle or proceed to hearing. Such offers are made in cases under state and territory laws even where 'soft costs' rules apply and have a chilling effect on complainants who face the conflicting messages of a generally costs-neutral jurisdiction and an early threat of a costs order even if successful in their claim. Where a claimant is unrepresented it becomes even more difficult to assess (a) the likelihood of success, and (b) the likely level of any damages awarded and therefore the impact of the Calderbank offer.

Calderbank offers may be suitable for commercial cases between parties that have relatively equal resources and bargaining power. In cases involving a substantial inequality of both power and resources, such as discrimination matters, they operate oppressively. They allow a respondent to leverage its resources and emotional detachment to impose fear and uncertainty on a complainant in order to deter them from continuing with their claim or to accept a low offer of settlement. In addition, the better-resourced party in a discrimination claim may be better able to research the (limited) court decisions to evaluate likely damages, informing the offers made.

Recommendation 6: That any Bill to amend the current costs regimes expressly exclude consideration of Calderbank offers in relation to any discretion to award costs.

54 *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 (20 February 2013).

55 Thornton, Pender and Castles (n 36) 13.

56 Ibid 21–27.

57 Ibid 27–34.

Remedies

The discussion paper notes that compensation or damages payments have 'historically' been low in discrimination law cases.[58] While true, this seriously understates the continuing effect of potentially low damages awards on future applicants. Low damages awards remain a very real prospect for potential applicants and compound the negative effects of current and proposed costs models.

In addition to low compensation awards, the range of remedial orders made by courts in Australia is very narrow, failing to ensure that the systemic nature of much discrimination or the persistence of discrimination in certain industries or by particular entities (including government) is addressed.

Compensation

Low damages remain a very real prospect for applicants for the following reasons.

Richardson v Oracle *has had some, but limited, effect on sexual harassment damages*

The important decision in *Richardson v Oracle*[59] has positively affected damages awards in the federal jurisdiction, but there are very few other decisions to guide potential litigants. While the recent case of *Hill v Hughes*[60] reinforced the Richardson approach and awarded a relatively high amount of $130,000 for general damages, this was a case with strong, written evidence of the harassment in the form of e-mails to the applicant by her harasser, a classic situation of harassment in a senior male employer to junior female employee and an egregious abuse of professional as well as personal power by the harasser, who had acted as the applicant's representative in legal matters and had intimate knowledge of her life. A complainant without a similar fact situation may not be dealt with by a future decision-maker in the same way, and there is not enough jurisprudence to provide sufficient guidance.

Thornton et al also note the unreliable basis of the change in 'community standards' towards sexual harassment noted in *Richardson*, *Hughes* and some state/territory case decisions: 'it is clear that higher damages as a result of "community expectations" remain tied to being able to establish significant physical or psychological harm'.[61] It is equally uncertain whether a shift in 'community standards' will be sufficient to increase damages awards in all other areas of discrimination.

Not all state and territory jurisdictions have followed *Richardson* in awarding higher damages in sexual harassment complaints or, indeed, in other discrimination cases.[62] Queensland shifted

58 Ibid 5. The data reported indicates this remains the case in most Australian jurisdictions and discrimination complaint types.

59 *Richardson v Oracle Corporation Australia Pty Ltd and Tucker* [2014] FCAFC 82 (15 July 2014) (*Richardson*).

60 *Hill v Hughes* [2019] FCCA 1267 (24 May 2019).

61 Thornton, Pender and Castles (n 36) 47.

62 Ibid 32–34.

its position to making damages awards with reference to *Richardson* only very recently[63] (2021) and only in the industrial jurisdiction. Damages caps keep awards low in NSW ($100,000) and even lower in WA ($40,000) and the NT ($60,000).[64] These caps, in turn, seem to have a continuing impact on damages in other state and territory jurisdictions that do not cap damages. Victorian damages awards in sexual harassment cases only, in contrast, however, have been much higher than other state and territory jurisdictions. Overall, this leaves a damages landscape that is mostly low, but relatively high in Victoria for sexual harassment cases, and in the jurisdictions where it is improving it is patchy and uncertain.

The uncertainty that continues in damages awards will combine with the burden of paying legal fees and/or the possibility of an adverse costs order to prevent people harmed by discrimination from asserting their rights before the law.

Complainants facing greatest disadvantage are most affected

The uncertainty in damages awards is further exacerbated for those complainants who experience greatest disadvantage. We do not know, for example, how post-*Richardson* courts will treat intersectional cases or cases that involve an already traumatised victim – cases that were often unsympathetically dealt with in the past – because these kinds of cases have not yet made it to determination post-*Richardson*.

What we do know is that those applicants with the poorest socio-economic status and the most compounded disadvantage – the very groups in society that could benefit most from compensatory damages for discriminatory harms – are least likely to be able to take the financial risk of an adverse costs order combined with the prospect of a low damages award.

It is important to note here, too, that one of the benefits of the post-*Richardson* era is that some complainants are able to negotiate higher settlement amounts in the shadow of the judgement. However, this is unlikely to be the case for the more commonly self-represented (and disadvantaged) complainants.

Damages awards remain low

The research by Thornton et al shows that when compared to other areas of law, discrimination awards are low.[65] Even with the improvements in Victoria post-*Richardson*, the average of damages awards for non-economic loss in defamation cases remain higher than the average in sexual harassment cases.[66]

The choice of costs model must be looked at through this lens. Applicants in discrimination law – an area of law where access to justice is crucial for upholding human rights – will not be

63 In *Golding v Sippel and The Laundry Chute Pty Ltd* [2021] ICQ 14. See also the discussion in Thornton, Pender and Castles (n 36) 45-46.

64 See *Anti-Discrimination Act 1977* (NSW) Section 108(2)(a); *Anti-Discrimination Regulations 1992* (NT) Reg 2; *Equal Opportunity Act 1984* (WA) Section 127(b)(i).

65 Thornton, Pender and Castles (n 36) 49 and following.

66 Ibid 49.

able to assert their rights where low and uncertain damages awards combine with symmetrical or discretionary costs models.

Expanding the remedial opportunities of discrimination law

As we note above, there is a lack of engagement by courts in addressing both the systemic nature of much discrimination, and the persistent failure by some industries or by some respondents (including government) to address discrimination.

In contrast, for example, the Canadian Human Rights Tribunal makes orders for systemic change, often requiring the unsuccessful respondent to engage with the Canadian Human Rights Commission to address the systemic practices and patterns of discrimination.[67] Similarly, under federal discrimination law in the USA, the relevant statutory authorities can undertake 'pattern and practice reviews' and seek remedial outcomes.[68]

Another aspect of Canadian discrimination law is that the Canadian Human Rights Tribunal can make orders for 'special compensation' where it finds the respondent 'is engaging or has engaged in the discriminatory practice wilfully or recklessly'.[69] Despite this head of damage being capped at $20,000, in just over 13 years beginning 2009, the Tribunal has made 42 such orders, averaging $22,824.[70]

Recommendation 7: That the Government conduct a similar inquiry in respect of remedies under discrimination law to ensure that the full range of remedial options is available and reflects the often systemic nature of discrimination experienced by the most marginalised of Australians.

Procedural complexity and summary dismissal applications

It has been observed that there is an increasing number of applications for summary dismissal and other procedural steps in discrimination cases, particularly at the federal level. At the federal level, less than ten percent of decisions of the (then) Human Rights and Equal Opportunity Commission dealt with applications for dismissal without full hearing (2.7% where complainant represented, and 8.8% where complainant unrepresented). These applications for dismissal were successful in 45.5% of applications where the complainant was represented and 69.3% were unrepresented.[71] In contrast, between nine percent and 23% of decisions of the Federal Circuit Court of Australia involve such applications (9.2% where complainant represented and 22.7% where complainant unrepresented. These applications

67 *Canadian Human Rights Act* (n 53) s 53(2)(a).

68 Banks (n 14) 299–300.

69 *Canadian Human Rights Act* (n 53) s 53(2).

70 Analysis of Canadian Tribunal decisions undertaken by one of the authors of this submission. The average is higher than the cap as the Tribunal has made orders for 'special compensation' against multiple respondents in some cases.

71 Banks (n 14) 119–120, Tables 5–11, 5–12 and 5–13.

were successful in 69.2% of applications where the complainant was represented and 93.8% where unrepresented.[72]

Even where unsuccessful, such applications are likely to heighten the anxiety of litigation for complainants. They increase the cost of continuing the claim and the risks of losing, in view of the prevailing costs rules and the low and uncertain levels of damages available.

Recommendation 8: That consideration be given to amending legislation so as to limit applications for strike out of claims without hearing to cases in which the President of the Australian Human Rights Commission has terminated under section 46PH(1B) or (1C).

Review

ADLEG is concerned to ensure that any reforms in this area of discrimination law are reviewed to identify whether or not they have achieved their intended effect. This would most appropriately be done through a statutory review to be held within a specified time that expressly includes consideration of data that can be compared to that examined by Thornton, Pender and Castles.

Recommendation 9: That any Bill to amend the current costs rules in federal discrimination cases make provision for a three- or five-year review of the operation and effectiveness of the amendments in achieving their objects, including through case data analysis.

72 Again, analysis of Canadian federal discrimination cases indicates that between 2009 and the present 42.4% of complaints were dismissed without hearing (including through abandonment or failure to appear at hearing). Where the complainant was represented, 37.5% of complaints were dismissed without hearing, and where unrepresented, 52.6% were dismissed.