





resources of companies and corporations , many people do not



key factor, if not *the* key factor, in many cases which prevent them from pursuing federal discrimination law complaints.

While it is desirable that not all discrimination matters proceed to court, the lack of matters that have been pursued to hearing in the federal jurisdiction is troubling. This is because of the important role of court cases in norm setting and reminding the community about their enforceable rights and the obligations of employers. Having some matters proceed to Court allows the law to develop and creates greater certainty about legal duties and obligations. It should be considered desirable that there is an increase in litigation in this area, especially when seen in the context of very high levels of sexual harassment and discrimination in the community. Matters proceeding to court form part of a complex preventative regime with the aim to eliminate systemic sexual harassment and discrimination.

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The current costs model pushes clients into pursuing cases under less beneficial legislation in other jurisdictions. For example, the *Disability Discrimination Act 1992* (Cth) has provisions which enable clients to argue disability discrimination based on a failure of respondents to make reasonable adjustments.<sup>15</sup> There are no comparative provisions under the *Anti-Discrimination Act 1977* (NSW). Under this state Act, clients are required to make reasonable adjustment types of arguments on more narrow indirect discrimination provisions. At KLC, many of our clients have had to consider litigating

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*Discrimination Act 1984* (Cth) has been significantly reformed, including through the introduction of new stand-alone causes of action for sex-based discrimination and hostile workplace environments based on sex.<sup>17</sup> It is vital that all applicants can use these new provisions in court and are not prevented from accessing these causes of action for fear of an adverse cost order. We believe this is a vital part of ensuring that the *Respect@Work* Report is implemented in practice.

### Recommendations

#### Recommendation 1: An Equal Access Costs Model

The Paper sets out an Equal Access' costs model to costs in discrimination matters. This model

obligations under international discrimination conventions to protect against discrimination if it is not removing this key barrier for applicant's enforcing their rights .<sup>20</sup>

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This model is the only model that both better protects our clients against the risk of an adverse costs order and enables them to recover legal fees when they win. A key consideration in thinking about how people can enforce their rights is to ensure that costs reform does not reduce access to justice or access to legal assistance. A potential issue identified with a hard costs neutrality approach (discussed below) is that it could reduce the range of legal options in this space and make it harder to bring claims. It is desirable given the prevalence of this issue across the Australian population that we do not reduce legal representation options in this space th9 (l)-113Sno p s (o)1.7 (s)-4.1 2.1 ( )1 (A)-0cet1b-4.1 (ptBd2.

If applicants and particularly lower socio-economic applicants are deterred from litigating these kinds of matters, these laws may have limited impact. Respondents will not be incentivised to follow these laws if there is limited risk that applicants will seek to rely on them to enforce their rights.

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KLC favours an Equal A



- that in considering whether an applicant has engaged in unreasonable acts or omissions leading to the respondent incurring costs ,

Key issues for our clients:

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Under this cost-neutrality model, the starting point is that each party bears their own legal costs.<sup>25</sup> This seeks to provide greater certainty on costs for all parties. However, the model significantly undoes this certainty by providing a broad discretion to the Courts on awarding costs. We are concerned that this significant discretion will continue to provide no certainty for our clients and deter them in litigating in this jurisdiction.

For example, we are concerned that our clients may have costs ordered against them if they lose their case (under the “wholly unsuccessful” factor), or due to a wide range of other factors under the “any other matters” that are relevant factor. We are also concerned that the factor of the “conduct of the parties” in litigation will also be used against our clients and will consider the refusal of Calderbank offers. As discussed above, Calderbank offers can be used detrimentally for our clients when they receive these before getting legal advice on their nature and impact. We are also concerned with how these offers can be used given the limited case law in discrimination matters and the difficulty of advising clients on the amounts they may be able to recover in court. In practice, this model will not









## List of Endorsements

		
<p>Redfern Legal Centre</p>	<p>Employment Rights Legal Service</p>	<p>Women's Legal Service NSW</p>
		
<p>Inner City Legal Centre</p>	<p>HIV/AIDS Legal Centre</p>	<p>Women's Legal Services Australia</p>
		
<p>Community Legal Centres Australia</p>	<p>Community Legal Centres NSW</p>	<p>Caxton Legal Centre Inc</p>
		
<p>Working Women's Centre SA</p>	<p>Western NSW Community Legal Centre Inc</p>	<p>Mackay Regional Community Legal Centre Inc</p>
		
<p>Basic Rights Queensland Inc as Working Women Queensland</p>	<p>Job Watch Inc</p>	<p>Circle Green Community Legal</p>

Australian Centre for Disability Law