14 April 2023

Proper Officer
Australian Government Attorney-General's Department
By email only: RespectatWork@ag.gov.au

Dear Proper Officer,

Submission on Consultation Paper
Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws (2023)

Women's Legal Services Australia welcomes the opportunity to make this submission on the *Consultation Paper: Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws (2023).*

We understand the consultation process is concerned with determining an appropriate costs protection model for anti-discrimination matters that proceed to court. The proposition is to replace the current 'costs follow the event' model with one of four alternatives: a 'hard cost neutrality' model similar to that contained in s570 of the *Fair Work Act 2009*, a 'soft cost neutrality' model as initially proposed in the draft *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*, an asymmetric costs model, or an 'applicant's choice' cost model.

For the reasons set out below, Women's Legal Services Australia strongly recommends the adoption of an asymmetric cost model (also known as an equal access model) for federal discrimination cases that proceed to court.

We are not intending to speak to the deficiencies we see in the a 'hard cost neutrality' model, the 'soft cost neutrality' model, or the 'applicant's choice' cost model. We have had the benefit of reading the submissions by Kingsford Legal Centre [KLC] and Australian Discrimination Law Experts Group [ADLEG] opposing those cost models, and we endorse their views as to the shortcomings of these options.

We also note that WLSA has been consulted in relation to its views and has endorsed the KLC submission. WLSA has also endorsed the Power to Prevent Coalition Joint Statement as to costs reform dated 14 April 2023.

We consent to this submission being published.

About Women's Legal Service Australia
Women's Legal Services Australia [WLSA] is a national network of 13 specialist women's legal services in each State and Territory across Australia, designed to improve women's lives through specialist legal representation, support, and advocacy.

WLSA members provide high quality free legal services, including representation and law reform activities, to support women's safety, access to rights and entitlements, and gender equality. We seek to promote a legal system that is safe, supportive, non-discriminatory, and responsive to the needs of women. Some of our services have operated for over 40 years and some provide specialised employment and discrimination law services.

WLSA members approach the legal issues facing women and their experience of the legal system within a broader analysis of systemic gender inequality. We are committed to providing individual services whilst also working towards deeper legal and cultural change to redress power imbalances and address violence against women and gender inequality.

Our advocacy focus

WLSA and our individual member services work to contribute to policy and law reform discussions to ensure that the law does not entrench gender inequality or gender-based discrimination, or unfairly impact women experiencing violence and relationship breakdowns. We are informed by a feminist framework that recognises the rights of women as central.

Our primary concern when considering any proposed legislative amendments is whether the changes promote gender equality and/or make the legal system fairer and safer for both our clients and all victims of violence against women.

Our feedback on this submission reflects this focus.

Introductory comments

Gender-based discrimination, including sexual harassment, targets some of the most vulnerable members of the workforce, with many of our clients in low paid insecure employment and in industries with poor track records for protecting female workers from discrimination and sexual harassment. However, we also regularly advise women who are in higher paid professional roles and note that sex-based discrimination and sexual harassment is pervasive and not limited to any particular type of workplace.

A major barrier to justice for people who have been subjected to discrimination and sexual harassment is the risk of having to pay costs to the perpetrator or the perpetrator's employer should they lose. This costs risk has always been a significant deterrent to our clients in litigating discrimination matters in the federal system, even those cases with very strong merits and evidence and for this reason, we commend the government for this review into establishing a more appropriate costs model for Commonwealth anti-discrimination laws.

Financial security is a pressing concern for many of our clients and economic insecurity has far-reaching and disastrous long term consequences for women and their children. Their often-precarious financial circumstances and fear of job loss and consequent homelessness and poverty impact upon and inhibit their ability to raise complaints of sex-based discrimination and sexual harassment. These fears are in fact well-founded, where most commonly the bringing of a complaint to the employer results in an end to her employment.

Case Study 1

Zoe* was employed as a casual kitchen hand, working regular weekly shifts to fit in with looking after her young children. A new head chef was employed and soon after, he began sexually harassing Zoe when they were in the kitchen alone. Zoe asked him to stop and when he didn't, she spoke to the restaurant manager. The chef denied touching her. The following week, Zoe stopped getting shifts.

*client's name changed to protect confidentiality

Positive obligations alone are not sufficient to change workplace culture
For many of our clients, the reality is an employer who is indifferent to, or complicit in, a hostile workplace.

We certainly welcome the amendments to the legislation aimed at eliminating discrimination in the workplace through positive obligations on employers to proactively effect change. However, the force of these positive obligations is weakened if employers are not held accountable when they fail in their duty and where barriers, such as costs risks, mean that employees are unlikely to pursue legal options for breaches of rights.

The current legal framework places the burden on the individual victim to complain about discrimination and take action for change. For our clients, a primary driving motivator is usually to make systemic changes to the workplace and improve conditions for those women who come after them. While we encourage our clients to seek compensation for their own hurt, humiliation and distress caused by the discrimination they have endured, we frequently hear our clients say they are speaking up because they "don't want other women to go through" what they had to go through, rather than to obtain compensation.

While the task of holding employers to account for their discrimination predominantly falls to the individual, litigation instigated by the individual has a crucial role to play in eliminating discrimination. It is imperative therefore that complainants are supported to bring complaints when employers fail in their duty and that the justice system does not place barriers in the way of accessing justice.

For this reason, the strategy going forward needs to be twofold – employers should be supported to embrace their positive duty to actively change workplace environments and litigation should be accessible to individuals subjected to discrimination in the workplace. By making litigation accessible, complainants can be compensated for the breaches of their human rights and employers are more likely to be motivated to comply with their duties.

Costs risk is the single biggest barrier to accessing justice
For most complainants, the exposure to legal costs is the single biggest barrier to pursuing a claim through to litigation. In our experience, respondents use the cost risks to their advantage and offer extremely low financial settlements or none at all in conciliation, knowing that a complainant is unlikely to take the risk of litigation.

It is clear that this costs risk stops employees from pursuing their rights beyond conciliation. This is especially true for women who are low paid and in insecure work, and for those who are employed in an organisation with significant resources and deep pockets to defend complaints. In turn, this provides an environment which allows discrimination and sexual harassment to flourish.

Any exposure to costs, even their own legal costs, prevents most of our clients from taking further action in relation to discrimination at work. The case study below illustrates the predicament faced by complainants in discrimination matters.

Case Study 2

Naya* worked for a large corporate employer. She was returning from her second period of parental leave and requested flexible work to accommodate her carer's responsibilities. The employer refused her request despite having flexible arrangements of varying kinds with other employees. Naya lodged a complaint with the State discrimination body. The employer sent the Head of Human Resources and inhouse counsel to the conciliation but refused to negotiate. Naya came to us for

advice on taking her matter to the State Tribunal. We advised Naya that she would not be liable for the employer's costs if she was unsuccessful but that she would have to pay her own solicitor's legal fees even if she won. We also advised Naya that she could run her case herself, thereby not incurring legal costs. Naya was intimidated by the employer and felt she could not represent herself. She could not afford legal representation and dropped her complaint.

* client's name changed to protect confidentiality

Even with the adoption of an asymmetric costs model, there is no way to resolve the fact that complainants will have to pay their own legal costs if they are not successful in their complaint and this risk may be a risk too great to overcome for some potential complainants, as outlined above. However, it is imperative that we remove the current costs risks barriers to ensure access to justice for those complainants who do wish to pursue a claim and who are willing to risk having to pay their own legal costs as the worst case scenario in the event they are unsuccessful in their complaint.

Recommendation: asymmetric cost model (also known as equal access model)
WLSA strongly recommends the adoption of the asymmetric costs model. This is the only model which removes as many of the barriers regarding costs as is possible.

Under this model, 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. Importantly, this model does not preclude employers from being protected from vexatious claims or claims that have no reasonable prospect of success, while at the same time, providing complainants with the security of knowing their legal costs will be substantially met if they are successful. This protection is particularly important in the discrimination jurisdiction where damages awards are low compared to other areas of the law.

Whilst we are not in a position to know the attitude of employers to the asymmetrical cost model, we make the following observations. First, irrespective of the model adopted, respondents will be protected from vexatious or otherwise unmeritorious claims. Second, assuming the choice is between a 'cost neutrality' model on the one hand, and an asymmetric model on the other hand, the employer is in the same position costs-wise with either option if they win, that is, they do not recover their own costs. The employer is only worse off with the asymmetric model if the complainant successfully argues breaches of the discrimination legislation by the employer resulting in damage. On this scenario, an employer who opposes the asymmetric model is effectively saying 'I want costs risks to act as a deterrence to meritorious complainants'.

Caselaw assists to set community standards regarding a safe workplace
Discrimination is currently an area of law with very few decided cases. This makes it difficult to give substance to the abstract objectives stated in the legislation and provide definitive legal advice on prospects and quantum damages.

Removing barriers to litigation is likely to lead to an increase in cases coming before the courts for judicial determination. There are advantages to this beyond clarification of the legislative provisions and protections.

Caselaw plays an important role in setting community standards as to what a safe workplace looks like and with setting community expectations as to appropriate workplace conduct and rights. Caselaw will also play a role in setting expectations as to employer obligations in creating and maintaining safe

workplaces and eliminating discrimination. This will have the added benefit of acting as an educative (and deterrent) tool for employers.

Conclusion

Access to justice is crucial for upholding human rights, and complainants will not be able to assert their rights where low and uncertain damages payouts combine with symmetrical or discretionary costs models.

The asymmetric cost model is the only option that removes financial barriers to accessing justice and supports people who experience discrimination and sexual harassment to take action, particularly those who are vulnerable and in insecure employment.

WLSA supports an asymmetric costs model because it provides access to justice. It does so because:

- a successful applicant will have their legal costs met by the respondent and this will remove the current barriers faced by most people subjected to discrimination in the workplace;
- if an applicant is unsuccessful, each party would bear their own costs rather than having to pay their own costs and the costs of the respondent;
- it provides a safeguard by way of very limited exceptions which allow a court to order an unsuccessful applicant to pay the respondent's costs; and
- it provides a provision which allows an applicant when successful in part of their proceedings to have all their legal fees recoverable, recognising the intersectional nature of claims and the fact that for a range of reasons, not all aspects of a claim made might be successful.

Finally, enabling complainants to bring matters to court has the potential to develop standards of behaviour in the workplace in accordance with community expectations and to minimise future discrimination through the deterrence factor of litigation.

We look forward to further consultation with the government on this model as required.

If you require any further information, please contact Pip Davis, Acting Chair of the WLSA Discrimination and Employment Law Committee at pip.davis@wlsnsw.org.au.

Yours faithfully,

Philippa Davis
Acting Chair
Discrimination and Employment Law Committee
Women's Legal Services Australia