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***Patron,** the Honourable Virginia Bell AC*

Women Lawyers Association of New South Wales

Response to the Review into an appropriate cost model for Commonwealth anti-discrimination laws – 2023

14 April 2023

Contents

Contributors

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About us

1. The Women Lawyers Association of New South Wales (**WLANSW**) is the peak professional body representing women lawyers in New South Wales. Our commitment is to promote and protect the interests of women in the legal profession. WLANSW has been improving the status and working conditions of women lawyers since 1952.

2. Our patron is the Honourable Virginia Bell AC. Our members include individuals and corporate members throughout New South Wales who are solicitors, barristers, judicial officers, academics, government and corporate counsel, non-practising lawyers, and law students.

3. WLANSW provides a network for social interaction and continuing education and reform within the legal profession and broader community.

Preamble

4. As outlined in the WLANSW submission into the National Inquiry into Sexual Harassment in the Workplace dated 28 February 2019:

   In Australia, only a small percentage of persons who believe that they have been sexually harassed at work report the conduct, either within their workplace or to an external body. This behaviour has shown little change since at least 2002 when the Australian Human Rights Commission ('the **AHRC**') commenced its survey. In 2018, the reputed figure for internal reporting was 17 percent, a slight reduction from the percent reported in 2012.

   Women make up the overwhelming majority of persons who have been harassed. The most common reason given for not reporting the harassment is fear of retribution or other adverse conduct by the alleged perpetrator or the employer. In 2018, 20 percent of respondents who reported being sexually harassed said that their complaint had a negative impact on them. In 2012 the figure was 29 percent (22 percent in 2008 and in 2003 it was 16 percent). These statistics are supported by a significant body of work that suggests that placing the burden of complaining and dealing with the complaint making process on the alleged victim is a reason why persons choose not to make complaints.

   Despite the fact that lawyers have a responsibility to act within Conduct Rules and sexual harassment can constitute professional misconduct, there is evidence that lawyers in Australia are expected to 'tolerate sexual harassment or pay the price of complaining'. Australian lawyers are more likely to have been sexually harassed compared to lawyers in other countries. The results of a survey conducted by WLANSW in 2018 indicate that in Australia, 37 percent of practitioners have experienced sexual harassment compared to 25 percent of practitioners from around the world. They also provide broader insight into sexual harassment within the legal profession and the context in which the key proposed recommendations are made.

Introduction

5. WLANSW welcomes the approach to date of the Australian Government into implementing the vast majority of the 55 recommendations made in the *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (**Respect@Work Report**). In our view, the Government has properly and comprehensively prioritised this extremely important aspect of law reform, placing an appropriate emphasis on the need to provide a safe workplace, where all workplace participants can expect to be free from sexual harassment and discrimination.

6. We note that the remaining recommendation of the Respect@Work Report that requires Commonwealth legislative action is Recommendation 25, concerning a costs protection provision for discrimination matters that proceed to court.

7. WLANSW welcomes the opportunity to provide a submission to the Attorney General's Department in response to its *Consultation Paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* (**Consultation Paper**).

Costs Models

8. The Consultation Paper canvasses several options for potential costs models to be introduced into anti-discrimination law. These include:

    1. the option originally recommended by the Respect@Work Report, which is a model based on section 570 of the *Fair Work Act 2009* (Cth) ('**hard cost neutrality'**)
    2. the option put forward in the Respect at Work Bill 2022 ('**soft cost neutrality'**)
    3. an asymmetrical cost model ('**equal access'**), and
    4. a hybrid or applicant opt-in model.

9. We consider that the disadvantages and advantages are well articulated and canvassed in the Consultation Paper.

10. Noting the findings of the Australian National University that the vast majority of federal discrimination cases result in no orders as to costs[1], WLANSW considers that reforming costs provisions in anti-discrimination legislation, from the current position where costs theoretically follow the event, will increase access to justice and unequivocally endorses the adoption of Option 3, the equal access model of costs. We address this further below.

Barriers to access to justice

11. WLANSW considers that the current costs provisions create some uncertainty for parties given that, in practice, costs do not always follow the event and as there is a

[1] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation* (Report, 25 March 2022) at 10.

real risk that an applicant can be subject to a costs order[2]. In our observation, the uncertainty that comes with these risks, can have the effect that complainants are hesitant to commence proceedings in one of the relevant courts if their complaint does not settle at conciliation at the AHRC. Indeed, it is submitted that only 2 percent of sex discrimination matters proceed to court.[3]

12. Any proposal to adopt costs provisions that centre around either soft costs neutrality (where the default position is that parties bear their own costs, with a broad discretion for the courts to award costs in certain circumstances) or hard cost neutrality (where each party bears their own costs other than in limited circumstances) will only compound the barriers to accessing justice as complainants will be less likely to be able to access lawyers offering pro bono or no win/no fee representation (given the disincentives for lawyers to take such matters on in circumstances where there is great uncertainty around a costs award, in the soft cost neutrality model, and the low likelihood of a costs order in the hard cost neutrality model). This places the lawyer and the complainant in the situation where they would need to recover significant damages in order to cover costs. In our view, this will significantly reduce the incidence of legal practitioners offering such arrangements. Further, a 'no win / no fee / conditional fee' model may only be available to larger firms who can carry the cost risk associated with conditional fee matters. This may have a chilling effect on the amount of lawyers practising in this area.

13. Further, many complainants would not be able to afford to engage lawyers in the absence of likely cost recovery. By contrast, our observation is that most, if not all, respondents to civil discrimination litigation are represented by external solicitors and barristers instructed by an internal team (often including legally qualified or Human Resources personnel).

14. As a result of the above, costs neutral provisions will make it more difficult for the victims of sexual harassment and discrimination to pursue the available legal remedies and bring discriminatory conduct to light, making the anti-discrimination jurisdiction less accessible, particularly for already marginalised complainants from First Nations, migrant and refugee, disabilities and LGBTQIA+ communities.

15. Further, we note that those applicants who wish to access a hard cost neutrality model can already elect to pursue claims under state anti-discrimination laws which mostly operate with cost neutrality. This extends beyond sexual harassment to other areas of discrimination. Similarly, applicants can pursue discrimination claims through the Part 3-1 General Protections provisions of the *Fair Work Act 2009* (Cth) (**FW Act**) and since, 6 March 2023, claimants can pursue sexual harassment claims through the Fair Work Commission. These two causes of action attract hard cost neutrality as section 570 of the FW Act applies to these claims. That is, should equal access provisions be legislated, claimants would be able to elect whether they utilised the hard costs neutrality routes that currently exist under the FW Act or proceed to access the equal access provisions that WLANSW favours.

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[2] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation* (Report, 25 March 2022) at 10.

[3] The Grata Fund *Submission to the Legal and Constitutional Affairs Legislation Committee's Inquiry on the Anti-Discrimination and Human Rights Legislation Amendments (Respect at Work) Bill 2022*

Development of anti-discrimination jurisprudence

16. Only an estimated 2 percent of cases in the federal discrimination jurisdiction proceed to a formal hearing[4]. One of the consequences of the barriers to complainants accessing the anti-discrimination jurisdiction is that there is limited jurisprudence, meaning that the law in this area is slow to develop and the lack of published precedents means that the community standards that are given effect to in settlements (sometimes in the vicinity of $1 million in negotiated damages for economic loss and general damages) are not necessarily reflected in readily accessible published judgements.

17. This has the effect that those applicants who are not legally represented are not aware of the full quantum of appropriate compensation outcomes that could be negotiated or awarded. In effect, costs regimes that prevent matters being pursued to fruition due to costs risks and a lack of cost award certainty, ensure that community standards are not reflected in published damages awards and society is kept in the dark about the price to be paid when discrimination occurs.

18. The development of the jurisprudence in the anti-discrimination jurisdiction would greatly benefit complainants and their legal representatives when assessing the prospects of a claim and the likely net financial benefit to a client in bringing such a claim.

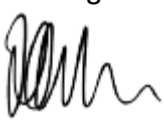
19. By significantly reducing the adverse costs risk to individuals with meritorious claims, through the adoption of the equal access model, more complainants will be able pursue their matters through to a final determination. This will likely have the effect that an up to date, consistent, field of federal discrimination jurisprudence, reflective of community standards, particularly with determinations of particular unresolved public interest issues, will be promulgated and accessible for all.

Conclusion

20. In short, adopting the equal access model in this jurisdiction will provide applicants a real choice in different cost models and aid in improving access to justice.

21. WLANSW thanks you for the opportunity to provide this submission and we would be very happy to discuss this submission further with the Attorney General if required. Please contact our President, Justine Anderson at executive@womenlawyersnsw.org.au.

Kind regards,



Justine Anderson
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14 April 2023

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[4] Australian Discrimination Law Experts Group, Submission No 4 (n 1) 24 at [47].