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Committee Secretary

Legal and Constitutional Affairs Legislation Committee

The Senate, Parliament of Australia

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

Dear Committee,

1. Thank you for the opportunity to make this submission, in relation to the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (**the Bill**). I am an honorary lecturer at the ANU College of Law at The Australian National University, where I research discrimination law. Together with Emerita Professor Margaret Thornton and Madeleine Castles, I was recently part of an ANU College of Law research team engaged by the Attorney-General's Department to undertake research into damages and costs in sexual harassment litigation, in fulfillment of two recommendations of the *Respect@Work* Report. I practice in the field, as a consultant at Bradley Allen Love Lawyers and a volunteer solicitor at Redfern Legal Centre's employment rights clinic. I am also a senior lawyer at the Human Rights Law Centre. I make this submission in a personal capacity; it represents my views alone.

2. I will limit my submission to the question of costs, at Schedule 5 of the Bill. In my view, the Bill represents a significant improvement on the status quo. However, I do not think it goes far enough. I recommend instead the adoption of asymmetrical costs protections, as found in the *Public Interest Disclosure Act 2013* (Cth) and *Corporations Act 2001* (Cth). In the event my recommendation is not adopted, I alternatively recommend amendments to the proposed s 46 PSA of the Bill to avoid unintended consequences and improve the provision's operation.

Costs Protection in Discrimination Law

3. The Sex Discrimination Commissioner's landmark *Respect@Work* report recommended the adoption of a symmetrical costs protection in federal discrimination law. This would mean that parties bear their own costs except where a party has acted vexatiously or unreasonably. This recommendation was modelled on the equivalent provision in the *Fair Work Act 2009* (Cth). It is a well-known and well-understood approach, having been deployed in employment law for over a decade. The case law has developed such that courts or tribunals will only very rarely depart from the position of costs neutrality, where the conduct of a party has been extremely unreasonable. We might describe this as the **Hard Costs Neutrality Model**.

4. The Bill adopts a different approach, reflecting the evolution of the Australian Human Rights

Commission's position, as set out most recently in its *Free and Equal* report. The Bill takes as its starting point that each party bears their own costs (at s 46PSA(1)). However, the Bill empowers the court to award costs to either party where it 'considers that there are circumstances that justify it doing so … as the court considers just' (at s46PSA(2)). The Bill sets out a range of factors that the court must have regard to in considering whether to make an order departing from the costs-neutral position. These include the financial circumstances of the parties, the conduct of the parties, settlement offers and the public importance of the proceedings (at s 46PSA(3)). We might describe this as the **Soft Costs Neutrality Model.**

5. As is well-known, and underscored by the *Respect@Work* report and the ANU College of Law's own research for the Department, the prospect of adverse costs is a significant barrier to those who experience unlawful discrimination seeking justice. The adoption of a Soft Costs Neutrality Model, would go some way towards addressing this barrier and thereby encourage complainants to vindicate their legal rights. If adopted, I consider the Bill will have a largely-positive impact on discrimination law and enable some complainants to seek justice in situations where they would not under the current law.

6. However, I remain concerned that uncertainty attaching to what is a novel proposal in the present context (albeit with antecedents in family law) will continue to deter complainants, at least until there has been several years of judicial consideration and guidance around the operation of s 46PSA. Although subsection (3) sets out mandatory criteria for courts to consider, the vagueness of the overarching test – 'circumstances that justify it in doing so … as the court considers just', will mean that the spectre of an adverse costs order will linger. For example, it is unclear whether, if a complainant is wholly unsuccessful, that alone would justify a departure from the no-costs presumption? If a complainant is partly successful, but the damages award is lower than a settlement offer from the other party, will that justify a departure from the no-costs presumption? The ongoing uncertainty around the quantum of damages, and the significant discrepancy between damages for discrimination and awards in other areas of the law, exacerbate this uncertainty – particularly where settlement offers are made.

7. One criticism of the proposed adoption of a Hard Costs Neutrality Model approach was that it would undermine access to justice by making it uneconomical for no-win, no-fee lawyers to operate in the discrimination field. It might be said that the Bill goes some way towards addressing this criticism through the Soft Costs Neutrality Model. However, the uncertainty of operation in practice will likely deter no-win, no-fee practitioners until there is greater judicial certainty around the operation of the provision and the circumstances in which a successful complainant will be entitled to costs. The benefit of providing some prospect of an award of costs is limited by this uncertainty, uncertainty that will deter complainants from pursuing complaints. The benefit of Hard Costs Neutrality Model, notwithstanding the access to justice point, is that it at least comes with certainty – there is over a decade of jurisprudence on the vexatious and unreasonable exceptions to the no-costs rules in the *Fair Work Act.*

A Better Approach: The Asymmetrical Costs Model

8. In my view, these issues could be addressed by instead adopting the costs protections presently provided in whistleblowing law: s 18 of the *Public Interest Disclosure Act* and s 1317AH of the *Corporations Act*. These provisions prevent a court from ordering a claimant, a whistleblower who believes they have suffered retaliation as a result of their whistleblowing and is bringing a claim, pay

another party's costs, unless the court is satisfied the claimant instituted the proceedings vexatiously or without reasonable cause, or is satisfied that the claimant's unreasonable acts or omission caused another party to incur costs. This costs neutrality is one-sided only: the provision does not prevent a court from ordering costs against the respondent (typically the whistleblower's employer). We might describe as this as the **Asymmetrical Costs Model**.

9. In recognition of the public interest in whistleblowers speaking up, and not suffering as a result, these laws recognise that whistleblowers should be shielded from costs if unsuccessful (unless vexatious or unreasonable), but able to recover costs if successful. I see significant similarity in the underlying policy intent of these laws, where individuals are called upon to vindicate a wider public interest. Given complainants in unlawful discrimination cases are similarly seeking to address a wider societal scourge, I do not see why they should be afforded a lesser level of protection. Put another way – why does the law provide special, indeed unique costs protection for whistleblowers, but not sexual harassment complainants?

10. The impost of this approach on the wider society would be modest. In cases where the litigation was unfounded or the complainant acted unreasonably (by reference to the well-developed standards), the respondent could recover costs. In cases where the complainant is unsuccessful, but not due to their unreasonable or vexatious conduct, parties would bear their own costs – as they would, presumably, in most cases under the Bill. Only in cases where the complainant succeeds would they be able to recover costs, again in circumstances which would likely be largely mirrored by the intended operation of the Bill. However, the benefit of the Asymmetrical Costs Model is the certainty it provides and the diminution of the spectre of adverse costs as a major disincentive to litigate.

11. I feel these issues acutely because I sometimes act for complainants in discrimination matters. I am presently acting pro bono for a complainant in a sex discrimination matter. Under the current costs regime, it is extremely unlikely that the client would proceed to litigation if the matter cannot be resolved through conciliation. The risk is far too high. Under the Bill, it would still be difficult for me to advise my client to proceed to litigation (notwithstanding what I consider to be good prospects), because of the uncertainty inherent in the operation of the presumption. The residual risk that, if unsuccessful, they would face an adverse costs order would still be prohibitive. The Bill is an improvement – a very welcome improvement. But I strongly believe law reform can and should go further still. Under an Asymmetrical Costs Model, I could confidently advise my client that they faced next to no risk of adverse costs in proceeding to litigation, provided they did not act vexatiously or unreasonably. That would truly enable access to justice.

12. I note that Grata Fund has recently published a report, *The Impossible Choice*, that recommends the use of asymmetrical costs protections more generally in public interest litigation (it describes this approach as an 'equal access' model'). I commend the report.

13. **For these reasons, I recommend that s 46PSA of the Bill be amended by adopting the Asymmetrical Costs Model present in the *Public Interest Disclosure Act* and the *Corporations Act*.**

Improving the Bill

14. If the Committee decides to recommend proceeding with the Bill's adoption of the Soft Costs Neutrality Model, I make two suggestions as to revisions which would improve its operation and

prevent unintended consequences. Relevantly:

a. I recommend that subsection (3)(d) be amended to include: 'and if so, the terms of the offer *(including non-financial terms)*.' Discrimination litigation is often directed at non-financial outcomes – for the conduct to cease, for workplaces to improve their approach to anti-discrimination, implement training and policies and so on, to seek an apology, an acknowledgement of hurt and so on. While subsection (3)(d) is sufficiently broad to encompass such matters on its face, given the traditional damages-focus of the courts, underscoring consideration of non-financial terms is important in light of the subject matter.

   To take an example – it might be that a party has made a settlement offer that is higher in financial terms than the ultimate judicial award of damages, but the offer does not admit fault or offer an apology, any commitment to workplace change etc. It would be undesirable for a court to assess such an offer, in comparison to the curial orders, purely in monetary terms. The vindication offered by a finding of liability can be priceless for complainants. However, I fear that – unless explicitly directed – courts will continue to view these matters in largely financial terms.

b. I recommend the inclusion of a new criterion, to the effect of: 'the beneficial intent of anti-discrimination legislation and the public interest in those who experience unlawful discrimination vindicating their legal rights.' While it might be thought that this point is encapsulated by subjection (3)(e), 'whether the subject matter of the proceedings involves an issue of public importance', I consider it likely courts will interpret that provision largely through the lens of legal change, cases that address uncertainty around the law and so on.

   Arguably, given the beneficial intent of anti-discrimination law and the public interest in addressing unlawful discrimination, all matters before the courts in this field involve an issue of public importance. Directing courts' attention to anti-discrimination law's underlying purpose will aid determination of the appropriate circumstances in which to depart from the no-costs presumption.

15. Thank you for the opportunity to make this submission. I would gladly appear before the Committee to discuss in further detail.

Yours sincerely

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