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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

Dear Committee,

1. I welcome the opportunity to make a submission in relation to the *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* (**the Bill**).

2. I am an honorary lecturer at the ANU College of Law at The Australian National University, where my areas of research include anti-discrimination law. I was part of the research team, together with Emerita Professor Margaret Thornton and Madeleine Castles, that prepared the *Damages and Costs in Sexual Harassment Litigation* report (**the ANU Report – enclosed as Appendix 1**) for the Attorney-General's Department (**the Department**), which helped inform the consultation that led to this Bill. The ANU Report was based on a review of every single sex discrimination (including sexual harassment), age discrimination, disability discrimination and race discrimination case decided in Australia across federal, State and Territory jurisdictions since 1984. This dataset represents the most comprehensive mapping of discrimination litigation ever undertaken in Australia. I also 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 make this submission in a personal capacity; these are my views alone.

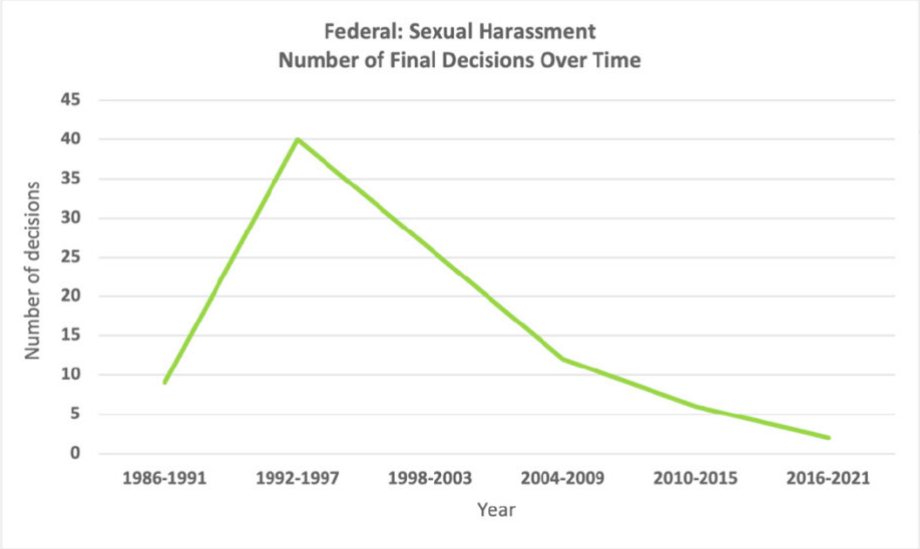
3. I welcome the Bill and recommend that the Committee support its enactment. It will represent a landmark step forward in providing a just, accessible anti-discrimination system in Australian law. The Bill will make a real, practical difference to those who experience unlawful discrimination. It marks a fitting culmination of the implementation of the Australian Human Rights Commission's Respect@Work report. I commend the Government for its willingness to pursue this important reform.

Context

4. Legal costs pose a major barrier to complainants accessing remedies available under anti-discrimination law. The spectre of adverse costs has led to significantly less anti-discrimination litigation than there might otherwise have been. As much as clear in Graph 5 of the ANU Report (extracted below), which demonstrates the significant decrease in sexual harassment claims commenced from the early 2000s onwards, following the shift from a no-costs mode to an adverse costs model in federal anti-discrimination law (which exposed complainants to substantial costs risk). As the recurring prevalence research by the Australian Human Rights Commission underscores, this

decrease in claims is not due to a dramatic decrease in the prevalence of unlawful sexual harassment in Australia. Similar trends are evident in other areas of anti-discrimination law.

Graph 5



5. It is worth reflecting on the nature of the rights being vindicated, or not, in this context. Discrimination is a societal scourge. It diminishes all of us. Unaddressed, discrimination makes Australia a worse place. The advent of anti-discrimination law was intended to address the prevalence of discrimination. But it left the work of addressing discrimination on the shoulders of individual complainants. When a complainant brings a complaint, and it ultimately proceeds to litigation, they are not just vindicating a private legal right – discrimination complainants are acting in the public interest. The spectre of costs risks means that unlawful anti-discrimination is going unchecked, and complainants are not able to pursue justice – for themselves, and for all of us.

6. Accordingly, removing the access to justice barrier posed by the current costs regime in anti-discrimination law is critically important. Making anti-discrimination remedies accessible is not only important for individual complainants, but will go a significant way to realising the largely-unfilled promise of anti-discrimination law to make Australia a better place.

Reform

7. For some time now, practitioners, academics and other stakeholders (including myself) have advocated for the adoption of an 'equal access' or 'asymmetrical' costs model in anti-discrimination law, to address the power imbalances and resource disparities present in many anti-discrimination cases, and recognise the wider public interest in complainants vindicating their rights under anti-discrimination law. Such a model was proposed by the ANU Report.

8. The model proposed was based on a number of whistleblower protection schemes in federal law, which provide for costs models whereby a successful applicant can seek their costs, but faces no liability to pay the respondent's costs if unsuccessful, except where they have acted unreasonably or vexatiously. Such provisions can be found in s 1317AH of the *Corporations Act 2001* (Cth), s 18 of the *Public Interest Disclosure Act 2013* (Cth); s 337BC of the *Fair Work (Registered Organisations) Act 2009* and s 14ZZZC of the *Taxation Administration Act 1953* (Cth).

9. As these provisions make clear, an asymmetrical costs model is not novel in Australian law. The whistleblower protections context is analogous to the anti-discrimination context, involving an individual litigant seeking to vindicate a wider public interest.

10. The Bill proposes a slight evolution of the asymmetrical costs model. But its core mechanism is the same: in most cases, the applicant will not face adverse costs risk, but will be able to recover their own costs if successful. This will diminish the costs risk faced by complainants in anti-discrimination litigation. It is a welcome step forward.

11. There are some areas of technical change that the Committee should consider. In that respect, I endorse the submissions of the Power2Prevent Coalition, the Australian Discrimination Law Experts Group (**ADLEG**) and Equality Australia. However, while these changes may refine the practical operation of the Bill, they are minor and do not diminish my support for the Bill as presently drafted.

12. In relation to these technical matters, I will limit myself to the following brief observation in relation to offers of compromise. I agree with the concerns outlined by ADLEG in relation to offers of compromise, including *Calderbank* offers, forming part of the assessment of costs. While the Bill is presently silent on the matter, there is a risk that – given such offers are commonplace in litigation – that they will nonetheless be considered by judges in determining costs under the new model, in assessing whether a party acted unreasonably and which party was successful.

13. One reason the salience of such offers is inapposite in anti-discrimination litigation is that such proceedings are frequently 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. 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.

14. It may therefore be desirable for the Bill to be amended as proposed by ADLEG, or for the explanatory memorandum to be revised to include reference to these matters, including the need for a holistic consideration of settlement offers and remedies sought, including non-financial claims.

15. I would be pleased to provide further input to the Committee as required.

Yours sincerely

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