

17 October 2023

Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
Canberra ACT 2600

By email: human.rights@aph.gov.au

Dear Chair,

Response to Questions on Notice

There have been a number of suggestions about how people can seek justice for their human rights abuses. What would be the best, most fit for purpose solution? Should human rights abuses proceed through the normal legal system, an expansion of the AHRC, the Federal Circuit Court, a new tribunal, or could we have a whole fit for purpose Federal Human Rights Court that is properly funded and actually accessible or a combination?

1. Women's Legal Service NSW (**WLS NSW**) supports a direct cause of action for breaches of human rights under a federal Human Rights Act, as well as a safe and accessible mechanism to resolve alleged breaches of human rights.
2. The Australian Human Rights Commission (**AHRC**) has proposed engaging its current conciliation model for alleged breaches of human rights. We support the conciliation to court pathway proposed by the AHRC, noting that conciliation is an informal, free, and accessible process to try to resolve complaints of alleged breaches. We believe it is important that complainants also have access to the Courts should their matter be inappropriate for conciliation or is otherwise unable to resolve through that process. There will be matters of public interest that are more appropriately adjudicated by a Court than settled in conciliation. Accordingly access to the Court should not be prohibitive, but accessible to those of limited means. Access to the Courts is also important to enable Courts to develop a body of precedent that may be used by judicial officers, government, and the community to help interpret the human rights contained within the Act.
3. Respondents to complaints of human rights breaches will generally be Federal Government departments and agents. To ensure that conciliation is a fair and equitable process, there must be mechanisms in place to mitigate the power and economic disparity between the parties, including by ensuring access to adequately funded free legal services for those in the community who are made vulnerable by their circumstances and cannot afford legal representation. Further, to ensure that complainants and respondents can meaningfully participate in conciliation and achieve a just



outcome, it is important that conciliation be facilitated in a manner that prioritises participants' safety, including cultural safety, and is trauma informed and gender sensitive.

4. We note the current research of Professor Tamara Walsh and Associate Professor Dominique Allen, referred to in their submission to the Inquiry (submission number 16) evaluating the effectiveness of dispute resolution mechanisms such as conciliation at the AHRC, and other State based anti-discrimination bodies. We defer to the expertise of the AHRC, Constitutional and Human Rights Law academics and researchers with regards to other safe, efficient, and cost-effective mechanism (such as the use of existing tribunals or their establishment) to adjudicate human rights complaints. However, we are of the view that the passage of a Federal Human Rights Act should not be delayed and for the time being, existing dispute resolution architecture, supported by adequate and sustained funding of the AHRC and civil society assisting complainants in these processes, should be used to assist in the resolution of complaints of human rights breaches.

How far will human rights be able to be protected if equal access to justice across different criminal, civil and legal matters is not provided?

5. We support the two limbed duty of equal access proposed by the AHRC in its Position Paper. We understand that the duty provides for:
 - 1.1 Access to legal representation in criminal matters where a defendant cannot afford a lawyer; and
 - 1.2 Non-discrimination in relation to accessing legal services and courts in both civil and criminal matters. We understand this to include the provision of interpreters, accessible court facilities and administrative processes, provision of specialist children's lawyers and advocates and culturally safe legal services. While not directly reflected within international instruments, the AHRC advocates the equal access to justice duty include access to Aboriginal controlled legal services for First Nations peoples.
6. The duty proposed by the AHRC will go some way to affording people access to the mechanisms of justice. We support this as a minimum. We also advocate for a broader duty that provides for a right to legal representation in civil and family law matters (in addition to criminal matters) involving substantial human rights issues. Our experience is that providing access to gender-sensitive, trauma-informed, and culturally safe legal representation in civil and family law matters empowers women and girls to share their experiences and to realise and claim their human rights.
7. By way of example, the outcome of family law matters has profound human rights implications for participants. Family law processes such as family dispute resolution and parenting orders can expose women and children to violence and abuse, impacting their right to life and security of person and to not be subjected to inhuman or degrading treatment or torture. By its nature, family law impacts a significant proportion of the community, yet legal representation in family law matters remains prohibitively expensive. Further, Legal Aid has strict guidelines for what matters it will fund and Community Legal Centres such as WLS NSW have limited resources and so can represent women in only a relatively small number of proceedings, despite significant demand.
8. We often advise victim-survivors of sexual, family and domestic violence and abuse who have previously negotiated or mediated with their ex-partner or participated in family court proceedings, without ongoing legal representation. We are regularly provided with consent orders, negotiated without legal representation, that expose women and their children to violence by their ex-partner. While we recognise and acknowledge the efforts of the Federal Circuit and Family Court of Australia to

address violence and systems abuse in the Courts, particularly through the establishment of the Evatt List, an enforceable right to access to legal representation that is culturally safe, gender-based violence and trauma informed is critical where there are safety risks to the mother (or caregiver) and children. Beyond the immediate risk to life and physical safety, we note the flow on effects from family law proceedings should orders not appropriately consider safety, including intervention from State Child Protection services and child removal; actions which have profound human rights implications for women and children.

9. While family law is our primary area of practice, we note many other areas of Commonwealth civil law which could be positively impacted by a broader duty to provide legal representation where substantial human rights issues are involved, including immigration, social security, employment, and anti-discrimination law.

If you would like to discuss any aspect of this submission, please contact Anna Blacket, Solicitor or Liz Snell, Law Reform and Policy Coordinator on ph: 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

Philippa Davis

Principal Solicitor