GRATA FUND

Submission to the Legal and Constitutional Affairs Legislation Committee's Inquiry on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

11 October 2022

UNSW SYDNEY

Grata Fund is a partner of the University of New South Wales Faculty of Law and Justice.

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11 October 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Submission to the Inquiry on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

Grata Fund is Australia's first specialist non-profit strategic litigation incubator and funder. We remove financial barriers to court, and support people and communities facing injustice to integrate litigation with movement-driven campaigns. We focus on supporting public interest cases in the areas of human rights, climate justice and democratic freedoms.

Grata Fund welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's inquiry on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (**the Bill**). We note that due to the short consultation period, we are providing limited comments focused on the costs reform aspects of the Bill.

Background to the need for costs reform

Grata Fund welcomes costs reform to increase access to justice for victim-survivors of sexual harassment and sex discrimination. In particular, we welcome the recognition that the risk of adverse costs orders 'may deter applicants from initiating court proceedings and creates access to justice concerns, particularly for vulnerable members of the community.'[1]

We know that sexual harassment remains endemic in Australian workplaces, with almost two in five women experiencing sexual harassment, and that only 17 percent

[1] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, [34].

of people experiencing sexual harassment making a formal complaint.[2] Currently, the first port of call for complainants at the federal level is the Australian Human Rights Commission, where over 70 percent of cases settle at conciliation.[3] It is estimated that only 2 percent of sex discrimination matters proceed to court.[4]

As the explanatory memorandum recognises, this is in part driven by the risk of adverse costs orders acting as a disincentive to applicants considering pursuing their sexual harassment claims in the federal courts.

To address this, the Bill proposes to introduce a 'costs neutrality' approach, where each party would bear their own costs in an unlawful discrimination proceeding but the courts would retain discretion to depart from this default position and make cost orders where they consider it just.

Costs neutrality will not adequately address barriers to access to justice for applicants in sex discrimination and sexual harassment claims

We submit that the costs neutrality approach in proposed s 46PSA (in cl 3, Sch 5 of the Bill) is not fit for purpose and does not go far enough to open up the courts as a forum in which victim-survivors of sexual harassment and sex discrimination can readily enforce their rights.

In particular, Grata Fund is concerned that the costs neutrality approach will limit the ability of applicants to secure legal representation and create new access to justice issues by disincentivising pro bono work.

Currently, many applicants making discrimination claims in the federal courts rely on barristers and solicitors to assist on a conditional cost basis or 'no-win, no-fee' model, where their costs can be recovered from the respondent if they are successful. However, the costs neutrality approach is premised on the default position being that parties bear their own costs, meaning that solicitors and barristers acting on a 'no-win, no-fee' basis would, by default, not be able to recover their costs even if the applicant is successful. While the proposal gives courts the discretion to depart from the default position, there is no certainty that this discretion will be exercised, even if the applicant is substantially successful in their claim of discrimination or harassment.

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[2] Australian Human Rights Commission, *Fourth national survey on sexual harassment in Australian workplaces* (2018).
[3] Australian Human Rights Commission, *Annual Report 2019-20*.
[4] Margaret Thornton, 'The Political Contingency of Sex Discrimination Legislation: The Case of Australia' (2015) 4 *Laws* 314, 319.

This results in a situation where either the applicant will have difficulty securing lawyers willing to forego their fees entirely, essentially working for free for lengthy periods of time in complex discrimination and harassment claims; or the applicant will be responsible for paying their own legal fees even if they are successful in their claim. Given the low amount of damages awarded to successful victim-survivors in discrimination and harassment claims, there is a high risk that any awarded damages will not even cover their legal costs, therefore leaving the victim-survivor in a worse financial position than before they brought the claim.

The difficulty of finding legal teams willing to assist on a non-recoverable basis is already faced by applicants in proceedings under the *Fair Work Act 2009* (Cth) and Administrative Appeals Tribunal proceedings under the *National Disability Insurance Scheme Act 2013* (Cth), where parties bear their own costs. Given the complexity of discrimination law, applicants who cannot secure legal representation are unlikely to self-represent successfully even if they have a meritorious claim.

The costs neutrality approach will therefore maintain legal costs as a significant barrier preventing victim-survivors from securing legal representation and accessing the courts.

Our recommendation: the Equal Access model

Grata Fund recommends that the Bill be amended to replace the costs neutrality approach with an Equal Access approach.

The Equal Access approach proposes to amend the *Australian Human Rights Commission Act 1986* (Cth) to remove the costs risk for applicants in discrimination matters so they can take meritorious cases to court with the confidence that, even if they happen to lose, they will not be subject to an adverse cost order.

Under this model:

- Applicants will generally not be liable for adverse costs, except where vexatious claims are made, or an applicant's unreasonable conduct in the course of proceedings has caused the other party to incur costs;
- Where an applicant is successful and the court has found that a respondent has engaged in discriminatory conduct, the respondent will be liable to pay the applicant's costs; and
- Where an applicant is unsuccessful, each party will bear their own costs.

Our view is that respondents should not be excused from paying costs where they have been found by a court to have breached anti-discrimination law. Under our proposed model, people and organisations that are found to have engaged in sex

discrimination or sexual harrassment in breach of the law will have to pay the legal costs of the applicant so they do not receive any financial benefit for breaking the law. This will also act as an incentive to change workplace cultures that permit discriminatory conduct.

An Equal Access model also ensures that applicants can continue to secure solicitors and counsel who are willing to act on a 'no-win no-fee' basis, as the applicant's legal team will recoup their costs if the case is successful. This will increase access to justice for victim-survivors of sexual harassment and sex discrimination.

Under this model, individual respondents could potentially be liable for their own costs, even if they are successful. However, it is worth noting the impact of this will likely be minimal - in an analysis of 9 years of *Sex Discrimination Act* cases in the Federal Court of Australia between 2012-2021, we found that the majority of cases were brought against a corporate or government entity, and only 10 percent of cases were brought against an individual only (7 total). Corporate respondents will be no worse off under this reform, as they are already able to claim legal costs as tax deductions.

This model is not new. It has already been adopted for whistleblowers under the *Corporations Act 2001* (Cth) and under the *Taxation Administration Act 1953* (Cth) at section 14ZZZC. In introducing this change to the *Corporations Act*, Parliament recognised that:[5]

> Legal costs can be prohibitive to any person seeking compensation for damage, and the risk of being ordered to pay the costs of other parties to the proceedings may deter whistleblowers and other victims of victimisation from bringing the matter to court.
>
> The new law addresses this by protecting victims from an award of costs against them in court proceedings seeking compensation except in limited circumstances.

We submit that this approach should also be adopted under the *Australian Human Rights Commission Act 1986* (Cth).

We have **enclosed** a draft amendment that introduces the Equal Access model to the Bill for your reference.

Further information on the Equal Access model is also contained in the **enclosed** Grata Fund report: *The Impossible Choice: losing the family home or pursuing*

[5] Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth), 44.

justice - the cost of litigation in Australia.

We would welcome the opportunity to discuss our submission and proposal with the Committee.

Please do not hesitate to contact at should you wish to discuss our submission.

Yours sincerely

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