12 October 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Email: legcon.sen@aph.gov.au

Dear Committee Secretariat,

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

The Kingsford Legal Centre (**KLC**) thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the Anti-Discrimination and Human Rights Legislative Amendment (Respect at Work) Bill 2022 (**the Bill**). We consent to the publication of our submission.

Overview

Overall, we congratulate the Federal Government for introducing this Bill and taking steps to finish implementing the outstanding recommendations of the Australian Human Rights Commission's Respect@Work Report. In particular, we welcome the introduction of a positive duty on employers in Australia to take steps to prevent sexual harassment in workplaces. If the Commission is properly resourced and supported to enforce this duty, this duty will have profound legal and cultural implications for all workers across Australia, supporting their rights to safe and non-discriminatory workplaces.

However, to ensure that this Bill implements the recommendations of the Respect@Work Report as effectively as possible in substance and purpose, we make the below comments and recommendations. We note the very short time frames for responding to the Bill, which we believe will affect the effectiveness of the legislation. In particular, we believe that more work and consultation need to be undertake in relation to:

- Making the Bill more clear, consistent across anti-discrimination laws and less complex to navigate;
- The compliance regime for positive duties and how they will operate;
- Representative complaints; and
- The operation of the costs provisions.

About Kingsford Legal Centre

KLC is a community legal centre providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. We have over 40 years' experience and broad expertise across discrimination law, employment law and working for people who have experienced harassment. As part of this work, we run a specialist NSW state-wide Sexual

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Harassment Legal Service, delivering legal advice, assistance and representation to people who have experienced sexual harassment and other forms of discrimination at work. Our Centre has also sat on the Respect@Work Council as an associate member.

Need for Broader Equality Law Reform in Australia

Before turning to the Bill, we would first like to take this opportunity to reiterate the importance of the federal government introducing comprehensive equality legislation in Australia. Australia's anti-discrimination legislation is inconsistent, filled with gaps, and does not reflect the intersectional nature of discrimination in Australia. We have consistently advocated for Australia to enact a comprehensive equality act that addresses all prohibited grounds of discrimination, promotes substantive equality, and provides effective remedies, including against systemic and intersectional discrimination.[1] **We call upon the federal government to take up this call, and work towards introducing a consistent, comprehensive, and intersectional legislative framework for Anti-Discrimination laws in Australia.** While this Bill is a positive measure, it will once again add to the complexity of law in this area when we need laws that are accessible, consistent and make sense to people that need to use them.

For now, we make the below comments and recommendations for the current Bill.

Key Issues for Comment and Recommendations

1. Limited Consultation on the Bill

We are concerned about the limited time frame given to the public to comment on the Bill. The Bill was referred to the Committee on the 27 September 2022, and there is a time limit of until 12 October 2022 to provide submissions on the Bill. We welcome the Government's commitment to fully implementing all of the Respect@Work recommendations, but we believe this legislative reform is a once in a generation opportunity and we must take the time to get it right. While we understand the move towards urgency, **we recommend greater time for considered feedback on the Bill from all impacted persons, communities, and stakeholders.** We believe that this is especially important to avoid any harmful unintended consequences from the Bill. We believe the Bill and the Senate Inquiry would benefit from more time to discuss and consider the best way to implement the changes.

2. Objects of the *Sex Discrimination Act 1984* (Cth)

The Bill amends paragraph 3(e) of the objects of the *Sex Discrimination Act 1984* (Cth) (**SDA**) to provide that a key object of the Act is to achieve, as far as practicable, 'substantive equality between men and women.' We welcome this amendment to include substantive equality as a clear objective of the Bill. The Committee on the Convention on the Elimination of all Forms of Discrimination Against Women has long stressed that state parties to the Convention, which includes Australia, have an obligation to respect, protect and fulfil the right to non-discrimination of women and implement their right to substantive equality with men.[2]

However, we are concerned that the current objects clause will reflect an outdated assumption that sex is binary. We are also concerned that the revision does not best capture substantive equality for persons with all the protected attributes under the Act. We therefore **recommend the revision of the objects clause of the Bill to refer to 'substantive equality for persons on the ground of sex, sexual**

[1] Joint NGO Submission on Behalf of the Australian NGO Coalition (April 2020) <https://external-careers.jobs.unsw.edu.au/cw/en/job/509277?lApplicationSubSourceID=11198> p. 9.
[2] Committee on the Convention on the Elimination of All Forms of Discrimination Against Women, 'General Recommendation No: 28 On the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women' (16 December 2010), Paragraph 16.

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orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding.'

3. Positive duty on employers to prevent unlawful sex discrimination

A. Duty to prevent unlawful sex discrimination etc.

The legislative implementation of a positive duty remains the key legislative reform in our view that will directly address and prevent sexual harassment. It is, therefore, vitally important that we get both the scope of the duty and enforcement right.

We are concerned that the positive duty proposed under section 47C of the SDA is narrower than the positive duty recommended in recommendation 17 in the Respect@Work Report and under the *Equal Opportunity Act* (Vic) in certain ways. In particular:

- We are concerned that the positive duty under the Bill only applies to measures taken to prevent unlawful *sex* discrimination, and not to other forms of unlawful discrimination, (for example, section 15 of the *Equal Opportunity Act* (Vic)). This fails to recognise the complex and intersectional nature of discrimination in Australia and also the strong evidence in the Respect@Work Report that sexual harassment is characteristically intersectional in nature.[3] This is also a missed opportunity to better protect and recognise intersectional discrimination which has long been identified as a significant legal gap in Australia.[4] We believe that the Bill would benefit from more time to consider how the positive duty could better reflect intersectional discrimination. At a minimum, we **recommend that section 47C(2) is revised to ensure that the positive duty exists in relation to all forms of unlawful discrimination at work under Commonwealth laws.**

- We also note that the Government has already recognised the need for a consistent approach to anti-discrimination laws in the Bill by extending the time limit for all unlawful discrimination complaints to 24 months. **As such, we also recommend broadening the positive duty to apply to all duty holders under anti-discrimination laws, including providers of accommodation, education or goods and services and clubs and sporting organisations**, like under *the Equal Opportunity Act* (Vic).

We also make the following points about the positive duty proposed:

- There may be cases where there is a significant impact on employees or other individuals from employers or PCBU not taking certain steps to prevent unlawful discrimination. We believe the positive duty provisions should take this into account. **We recommend revising section 47C(6) to ensure that the 'impact of not taking a certain measure' is included as a matter to be considered in determining whether an employer or PCBU has complied with their positive duty.**

- To prevent sexual harassment and discrimination at work, duty holders must carefully consult with workers to ensure that their policies and practices on ant-discrimination laws are robust and are working in practice. Employers should value the input and feedback of their workers in their work to prevent sexual harassment and discrimination. **We recommend revising section 47(6) to also include an obligation to consult with workers on the positive duty as a factor to be considered in determining whether an employer and PCBU has complied with the positive duty.**

[3] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (March 2020) 10.
[4] Ibid 462.

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- We support the positive duty capturing sex discrimination by a broader range of persons than are protected from sex discrimination under the SDA. We consider this appropriate given that the duty is to prevent unlawful sex discrimination. **We recommend that the positive duty is revised to ensure that duty holders are required to take reasonable steps to prevent discrimination by a range of third parties, including clients, customers, and workers in labour hire arrangements.** In our experience this is a significant and troubling area of sex discrimination and harassment where employers and PCBU do have a range of measures available to them to prevent such conduct. We believe that the "reasonableness" test in section 47C(1) would mean that this would not be unduly burdensome for employers/PCBU, as it would recognise that the range of options and measures available in relation to third party harasses is different. This is a key area where we need to increase protection and positive measures and the Bill do not sufficiently address this.

- We are also concerned about how a finding that a positive duty has not been breached by the AHRC may interact with complaints or representative actions under the AHRC Act. **We recommend revising the Bill or Explanatory Memorandum to make it clear that a finding that a positive duty has not been breached by the AHRC will not determine other liability of duty holders under any laws.** Again, as these are new measures, we believe that more time to consider how these provisions will operate would be helpful.

B. Compliance regime for positive duty

Need to adequately fund the AHRC for compliance role

It is very difficult to comment fully on the potential effectiveness of the Bill without clarity on the additional resourcing to be provided to the AHRC. Earlier this year the AHRC had its budget reduced by one third over the next four years.[5] **The Government must urgently restore adequate funding to the AHRC and increase funding to support the new legislative powers of the AHRC under the Bill. This funding plan needs to be made publicly available as soon as possible.** Without a budgetary commitment to the role and functions of the AHRC, these new powers may have limited impact. At present, demand on the AHRC far outstrips its available resources. For this new compliance role of the AHRC to be meaningful, we need to see a significant budgetary increase to the AHRC before the Bill is introduced.

Built-in statutory reforms

As we have highlighted above, this is a once in a generation chance to improve our discrimination laws and shift the onus away from individual responses. We understand that for employers/ PCBU positive duties may seem like a significant new regime that needs time to implement. However, this must be tempered against the urgent need for reform and the reality that the high prevalence of sexual harassment means significant ongoing harm the longer it is delayed.

The amendments to the *Australian Human Rights Commission Act 1986* (Cth) (**the AHRC Act**) to empower the AHRC to monitor, assess compliance with and seek enforcement of the positive duty are set to take effect 12 months after Royal Assent. We support a staged approach for the introduction for the compliance regime to give enough time for employers, PCBU and workers to start to develop an understanding of the duty and their liability and rights under it. However, we recommend that the compliance regime commence after a longer period of cultural and systems reform on the positive duty, including the development of the capacity of the AHRC to start to undertake its new compliance role.

[5] Michelle Brennan and Dr Shannon Maree Torrens, 'Australian Human Rights Commission' (2022) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview202223/AustralianHumanRightsCommission.

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We recommend the Bill include a legislative requirement for statutory review to table a report to Parliament outlining the effectiveness of the amendments, including the positive duty, and whether the Act is meeting the objects of the Act. This report should be introduced at least 18 months after the commencement of the Bill. We also recommend that the Bill sets out a process for regular and ongoing statutory review of the Bill.

More guidance on when the Commission may inquire into breaches of the positive duty

Section 35B(1) of the AHRC Act is to provide that the Commission "may inquire into a person's compliance with the positive duty in relation to sex discrimination if the Commission reasonably suspects that the person is not complying." **We recommend that more guidance is provided in the Bill on when the AHRC may start inquiries into compliance with the positive duty, such as taking into account the nature of the employer, the nature of the alleged non-compliance, and the scope of the non-compliance.**

Need for clear pathway for anonymous reports about breach of positive duty

We are concerned by the lack of any mechanism under the Bill to enable people who have experienced or witnessed the failure of employers and PCBU to comply with their positive duty to make reports to the Commission about this. **We recommend the creation of clear pathways for workers and other persons to make anonymous reports to the AHRC about the failure of duty holders to comply with their positive duty.** Workers and other interested parties should also be able to make these reports without making formal complaints under the AHRC Act.

Need for people who report breach of the duty, or who are directly affected by it, to be kept up to date with inquiry process

We are concerned that there are no proposed amendments to the AHRC Act to require the Commission to update persons who have made reports about the failure of a person to abide by their positive duty to receive updates about the inquiry process. **We recommend the creation of a clear right for people who have informed the Commission about concerns of breaches of the positive duty to be informed about the inquiry process.**

We are also concerned that there may be circumstances where the Commission commences an inquiry into the breach of employers or PCBU of their positive duty but affected workers and other parties are not informed. We are particularly concerned that the Commission may obtain information of importance to workers and other parties in making complaints to the AHRC about unlawful discrimination, but that the Commission may not provide this information to these individuals**. We recommend that if the Commission commences an inquiry into compliance with a positive duty, the Commission keeps impacted workers and other individuals informed of its process and any findings that may specifically relate to them.**

Need for time limits for employers and PCBU to respond to inquiry into positive duty

Proposed section 35C sets out a process for the Commission to notify a person that the Commission is commencing an inquiry into their compliance with the positive duty. Section 35C (2) says that the Commission must not find a person is not complying with their duty unless it gives them a reasonable opportunity to respond about their compliance in person or by writing. **We recommend that a clear time frame is given under the Bill for duty holders to provide a response about their compliance with the positive duty.** This will create certainty for all parties involved about the process and assist with speeding up the process of inquiries.

Need for clarity on when Commission will issue compliance notices and for publication of notices

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Section 35F(1) provides that if the Commission finds a person is not complying with the positive duty, the President "*may* give the person a written notice." This is to set out their name, the details of the failure to comply, what action they need to take to address the failure, and a reasonable period to address the behaviour. There is no clarity on when these notices will be issued. These notices are important because failure to comply with them can trigger enforcement action by the President (s35J).

We recommend that the Bill is revised to include statutory considerations on when the Commission will issue compliance notices. Some legislative considerations could include:

- **the number of people potentially affected;**
- **the nature and type of breaches and the impact on individuals; and**
- **whether the employer/PCBU has received a notice in the past.**

We also recommend that these notices are made available to the public, such as via the AHRC website. This is in our view vital to create a culture of transparency around how employers and PCBU are complying with their positive duty, and to encourage all employers and PCBU to comply with the duty.

Need for time limits on reconsideration of compliance notices and applications to court

Section 35G sets out a process for an employer or PCBU to request the President to reconsider a compliance notice. There is a time limit on an employer and PCBU to apply for this (s35G(2)(c)), but no time limit for the President to respond. The President just must "act expeditiously" in reconsidering a compliance notice (s35G(5)). **For clarity and to assist with the timely resolution of matters, we recommend a time limit is placed on the President to reconsider compliance notices.**

We are also concerned that the Bill does not set out any time limit under section 35J for the President to apply to the Federal Court or the Federal Circuit and Family Court of Australia for orders about non-compliance with compliance notices. We submit that this is necessary to give all impacted parties certainty about the process, and to avoid lengthy litigation. **For clarity and to assist with the timely resolution of matters, we recommend that a time limit is placed on the President to bring an application for orders under section 35J of the Bill.**

Need for publication of enforceable undertakings in relation to positive duty

Section 35K(1) of the Bill provides that section 47C of the SDA is enforceable under Part 6 of the Regulatory Powers Act, which creates a framework for accepting and enforcing undertakings relating to compliance with the provisions. For the reasons above in relation to compliance notices, **we recommend that the Bill is revised to provide that enforceable undertakings must be published on the Commission's website**. At the moment, the Bill only says this *may* happen (s35K(5)). This is vital to ensure greater transparency and compliance.

Need for clarity in Bill for remedies for breaches of compliance notices

There is no mention of penalties under the Bill for employers and PCBU for failing to comply with compliance notices by the AHRC. **We recommend that the Bill includes penalties that the Federal Courts can order against employers and PCBU for failing to comply with compliance notices. We also recommend that the Bill makes it clear that the Court can order that any or all of these penalty amounts are awarded to affected workers or other persons.**

Need for capacity for individual or representative claim to start compliance process

We are concerned that if there is a delay or break down in the AHRC's inquiry process into breaches of the positive duty, individuals could be at risk of harm. **We recommend that the Bill is revised to create**

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a right of recourse for individuals or representatives to bring action in the courts for the AHRC to commence inquiries or further their inquiry compliance process.

4. Inquiries into systemic unlawful discrimination

Restrictive definition of "systemic unlawful discrimination"

The Bill empowers the Commission to inquire into any matter relating to systemic unlawful discrimination, or suspected systemic unlawful discrimination, and to do anything incidental or conducive to the performance of these functions (s35L(1)). However, we are concerned that the definition of "systemic unlawful discrimination" is too narrow under section 35L(2)).

We support a broader definition of 'systemic unlawful discrimination' under the Bill, which takes into account other factors such as:

- **the nature of the conduct;**
- **the nature of the parties involved (including whether any perpetrators are in positions of power); and**
- **the length of time of the systemic unlawful discrimination.**

Need for enforceable inquiry powers of the AHRC for inquiries into systemic unlawful discrimination and the discharge of the positive duty

We are concerned that the Bill does not fully implement recommendation 19 of the Respect@Work Report, which lists powers of the AHRC to inquire into systemic unlawful discrimination. This recommendation proposed that the Commission be given powers in inquiries into systemic unlawful discrimination to require persons to: (a) give information, (b) produce documents, (c) examine witnesses and (d) issue penalties for non-compliance with these requests.

These powers are vital to ensure that employers and PCBU take inquiries by the AHRC seriously, and that the AHRC is best equipped to carry out its inquiry processes. We also submit that these powers should be given to the AHRC with respect to its inquiry processes into compliance with the positive duty. **We recommend that the Bill implements recommendation 19 of the Respect@Work Report fully and also ensures that the AHRC has the same powers for its inquiry processes into compliance with the positive duty.**

5. Subjecting a person to a hostile workplace environment on the ground of sex

Need for consistency across circumstances to consider in sex-discrimination claims

Proposed section 28M makes it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex. We are concerned that the factors under section 28M(3) to consider in determining whether a workplace environment is hostile on the grounds of sex are inconsistent with the factors listed for consideration for whether there has been sexual harassment (section 28(1A)), or harassment on the grounds of sex (section 28AA(2)). **For consistency, we recommend that all the circumstances to consider across the sexual harassment, sex-based harassment and hostile work environment sections are revised to be the same.**

Need for a broad definition of "hostile" under the Bill

We are also concerned that the proposed section 28M is too restrictive in its focus on hostile work environments as ones that are "offensive, intimidating and humiliating." We support a broadening of the provision to provide that a hostile workplace can be one that prevents women from doing their job, even if they do not cause them to be offended, intimidated etc. For example, an environment may be hostile to a woman on the ground of sex by ignoring her contributions, or otherwise preventing her from succeeding at work, even where these behaviours may not strictly offend, intimidate, or

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humiliate her. **We recommend that the Bill is revised to make it clear that a hostile work environment can be one where a person of a particular sex is made to feel "unwelcome" or excluded" or otherwise prevents them from enjoying their rights at work. We also recommend that this form of discrimination is extended to other attributes protected under anti-discrimination laws** (e.g., subjecting a person to a hostile workplace environment on the ground of disability).

6. Meaning of harassment on the ground of sex

We support the Bill's omission of the word 'seriously' under section 28AA(1)(a) of the SDA. However, we do not think this goes far enough in recognising that sex-based harassment is demeaning by its very nature. We also think requiring sex-based harassment to be 'demeaning in nature' sets an unnecessarily high standard for applicants, which is out of line with the other sex discrimination provisions and is not necessary given that the conduct needs to amount to 'harassment' in any case. **We recommend that the words "of a seriously demeaning nature" are removed from section 28AA(1)(a).**

7. Representative application

We recommend the Bill is revised to make provision for two types of representative actions:

- **Those for a class of people affected; and**
- **Those brought by a 'representative' or 'member organisation' for the benefit of / in the interests of the members of the group.**

In our view, the Bill does not adequately cover the second instance, where a representative group takes action. This is especially important to overcome some of the standing issues under discrimination law and also to move further away from the individual based complaints system and to improve public interest litigation and compliance. This is an ongoing issue around a conflict in standing provisions. We recommend the removal of "at least one person" to commence the complaint if it is brought by a bona fide representative group that acts in the interests of the people affected. In some cases, a representative group complaint should not need an individual complaint to commence.

Support for Australian Discrimination Law Experts Group Submission on the Bill

We have had the benefit of seeing the Australian Discrimination Law Experts Group (**ADLEG**) Submission on the Bill and we agree with their recommendations in relation to representative complaints. This section needs to encourage litigation from groups to enforce the rights of people affected. We agree that standing in representative complaints should be amended to reflect actions under 46P of the Australian Human Rights Commission Act. We also agree that 46POA should be removed for the reasons outlined by that Group and our original position on that provision has changed, with a view to the purpose of representative complaints. Representative applications are a major area needing wider reform across the discrimination law system and we believe there would be great benefit in greater consultation on this, especially with advocacy groups that could potentially benefit from these.

Further, we are concerned that the Bill does not make it clear that representative claims can pursue group-based remedies, for example, changes to employment policies and practices. The Bill should be revised to make it clear that representative applications can pursue remedial orders beyond compensation to address the group-based nature of a representative application. **We support the recommendations made by the ADLEG on representative applications, including the revision of the AHRC Act to provide that remedial orders beyond compensation can be made to address the group-based nature of a representative application.**

Need for public interest representative actions that do not undermine rights of complainants under the AHRCA

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We are concerned that the Bill will prevent representative actions being brought to redress public interest concerns as well as individual litigation at the same time where the liability and remedies are not identical. For example, we submit that it should be possible for representative claims to be brought in the public interest in relation to discrete issues, such as changes to workplace policies and practices affecting a broad range of employees, and for the individuals in these claims to pursue their own litigation for liability and remedies specific to them. **We recommend that the Bill is revised to make it clear that representative actions can be brought for discrete issues and remedies in the public interest, which do not affect the rights of individuals to bring their own proceedings, so long as the proceedings do not directly overlap.**

8. Costs

We believe that this is an area where the Bill would benefit significantly from further time and consultation. It has not been possible to fully address this issue, including the complex role that costs play in access to justice under the current timeframe. For many of our clients, the risk of an adverse costs order in the federal jurisdiction is a significant barrier to bringing action and results in many matters not being pursued. This is especially the case for people who work and who are unlikely to qualify for legal aid. For working women in particular (who these reforms are targeted at assisting) the threat of a costs order is a real impediment to taking action and is an important access to justice issue.

While it is positive that the Bill creates a default position that each party bears their own costs (46PSA)(1), the operation of 46PSA (2) and (3) brings uncertainty to this proposition and potentially delivers neither a "no costs" jurisdiction or cost certainty. Furthermore, where the power imbalance and resourcing imbalance are great against workers, as these are in these matters, the provisions also bring with them the risk that Calderbank offers could be used to affect this cost neutrality. We can see this acting as a serious impediment to our clients in bringing claims and not delivering the cost neutrality that the Bill promises.

Support for asymmetric costs provisions

Due to this, we recommend the development of an asymmetric costs/ equal access regime across discrimination law that goes further to increase access to justice and ensure applicants have access to representation. This is important for a range of reasons, including enabling applicants to fund litigation, to encourage respondents to settle matters, and to deter respondents from breaching their obligations under anti-discrimination laws.

Section 46PSA(3) does not mention vexatious or unreasonable conduct at all, and instead sets out a broad range of factors for the court to consider when deciding to award costs. In our view, this provision will act as a deterrent to applicants in undertaking litigation and not deliver the access to justice it should. We are also concerned that some of these factors may continue to serve as a barrier for applicants to commence litigation. For example, costs can be awarded when a party is "wholly unsuccessful" in court (s46PSA(3)(c)) or taking into account the party's financial position (s46PSA(3)(a)). This could result in applicants being ordered to pay costs when their case is unsuccessful in court despite the case having some merit when filed or being ordered to pay costs if found to have financial means.

We recommend an asymmetric costs provision which would provide greater protection to applicants when they are unsuccessful in bringing proceedings (such as a provision like section 570 of the Fair Work Act), but also increase access to justice by allowing applicants to recover costs when successful. We believe consultation on whether an equal access model should be introduced federally in all discrimination matters is long overdue. We note a recent proposal by the Grata Fund to introduce this model in 'public interest proceedings', which we believe should include discrimination law proceedings. Under this model, where an applicant is unsuccessful in their proceedings, each

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party will bear their own costs unless exceptional circumstances apply (such as those under section 570 of the FWA).[6] However, if an applicant is successful, the respondent will be liable to pay their costs if they have brought "public interest proceedings."[7]

If you have any questions about this letter, please contact Emma Golledge at legal@unsw.edu.au.

Yours faithfully,

Kingsford Legal Centre

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[6] Grata Fund, 'The Impossible Choice: Loosing the Family Home or Pursuing Justice – the Cost of Litigation in Australia' (2022, UNSW Sydney) 22.
[7] Ibid.

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