

20 October 2023

Ms Anita Coles
Committee Secretary
Parliamentary Joint Committee on Human Rights
via email: human.rights@aph.gov.au

Dear Ms Coles,

Inquiry into Australia's Human Rights Framework

Kingsford Legal Centre thanks Senator Thorpe for the opportunity to respond to the following questions on notice.

- 1. Nationally most of the human rights abuses are the direct result of government departments and agencies, such as housing, police, corrections, child protection, welfare, health, and education. Because of this huge power imbalance against individuals, would you support a shift in the onus of proof and costs of any litigation?**

Onus of proof

The unfair evidentiary burden and onus can be a huge issue for people bringing claims and we would strongly support consideration of this in relation to a *Human Rights Act*. There are different options and wording that could be considered such as 361 of *Fair Work Act* or s136 of *Equality Act* (UK).

In our recent preliminary submission on reforms to the New South Wales (NSW) *Anti-Discrimination Act 1977*, Kingsford Legal Centre called for further consultation on instituting a shifting burden of proof.

In the anti-discrimination context, an option we have considered is that an applicant would need to show a prima facie case of unfavourable treatment based on an attribute. The burden would shift to the respondent to show that the treatment was not based on a discriminatory reason.

In the human rights context more generally, once the applicant had established a prima facie case, the burden would shift to the respondent to show that the unfavourable treatment did not occur, or that the treatment was otherwise justified and not unlawful.¹

¹ See National Association of Community Legal Centres, NACLC Submission to the Commonwealth Attorney General, Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation (March 2011). We also note Kate Eastman SC's answers to Questions on Notice for the current inquiry and would support a similar approach.

A shifting onus of proof is appropriate in human rights matters given respondents, which are typically government departments or public agencies, usually have better access than applicants to the required evidence. This needs to be seriously considered given the types of respondents that regularly are party to human rights complaints. They are also typically better resourced than individual complainants and may have model litigant status. All these elements suggest that the burden of proof should not rest with the complainant/ applicant in human rights matters.

Access to justice and the ability for individuals to realise their rights *in reality* must be actively considered in any drafting of a *Human Rights Act*.

Costs

For a long time, we have advocated against the current operation of costs in the discrimination context. The risk of adverse costs order is a very real impediment currently to people enforcing their rights. This should not be replicated in the human rights space.

Any federal *Human Rights Act* must include protections against adverse costs orders. This is vital to ensure that any remedies under the Act are accessible to those who need them most, particularly when applications are brought against public institutions or agencies.

Kingsford Legal Centre has written about this issue extensively in the context of costs orders in federal discrimination law cases. We support an equal access costs model in discrimination law and would see this as equally important in human rights matters. There is widespread support for an equal access model across Australia, and KLC has been part of the Power to Prevent coalition that has endorsed an equal access model. See attached statement.

2. Explain why you recommend that the Act include provision for interested groups and organisations to bring complaints about human rights violations on behalf of impacted individuals?

Every day, we see the burden fall too heavily on individuals to remedy human rights abuses. This leads to ineffective change and norm setting. In the discrimination context, the burden on individuals has meant that discriminatory cultures have continued to flourish, despite legislation outlawing it. The *Respect@Work* National Inquiry Report clearly demonstrated that enforcement by individuals of their rights was not effective in stamping out unlawful behaviour.

Human rights litigation is in the public interest and representative complaints serve an important community function. Representative complaints can help address systemic breaches of human rights and can prevent further harm. Too often, the burden of legal action falls on individuals who are already dealing with the consequences of human rights breaches. This is clearly evident in the context of robo-debt for example, where many vulnerable people were affected. A representative complaint could have prevented significant harm in that case. Interested groups and representative organisations are well-placed to identify the most pressing issues affecting their constituencies and to shoulder some of the

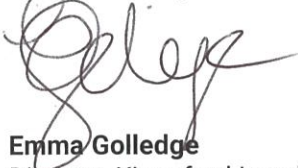
risks associated with legal action. This can be important in evolving and testing the law and moving compliance forward.

Kingsford Legal Centre supports a broad approach to representative complaints, in order to create a culture of public interest litigation. This works hand in hand with measures around the onus, and costs, as these questions identify in ensuring human rights are realised in reality and improve the lives of people most affected by human rights abuses.

Thank you for your time and questions.

If you would like to discuss these answers further please contact KLC.

Yours sincerely,



Emma Golledge
Director, Kingsford Legal Centre



Nina Ubaldi
Law Reform Solicitor

Encl. Power2 Prevent Statement on Costs

Joint statement

Time for equal access in discrimination claims

We all deserve to be safe at work and free from discrimination and sexual harassment. While sexual harassment is pervasive across all industries and all employment levels in Australia, it is not inevitable. **The Australian Government has the power to prevent discrimination and sexual harassment** by adopting an equal access costs model to ensure that people who are harmed can access justice and achieve fair outcomes.

A major barrier to justice for people who have experienced discrimination and sexual harassment is the risk of having to pay the legal costs of the perpetrator or the perpetrator's employer should they lose. Equally, they must be able **to recover their own legal costs if they win** to ensure that they are not left out of pocket, and that legal representation is financially viable and accessible.

These risks stop people from pursuing their rights. This is especially true for diverse and disproportionately affected communities, for people who are low paid and in insecure work, and when people are up against an organisation with large resources such as many employers.

The rules for awarding costs in discrimination matters have a significant impact on access to justice as legal costs can be hundreds of thousands of dollars and many people do not bring claims for fear that they could have to pay the other side's costs if they lose. This means people do not enforce their rights and claims are rarely aired in court. This allows discrimination and sexual harassment to flourish.

The **Power to Prevent** Coalition is a group of more than 60 diverse community organisations, unions, academics, peak bodies, health professionals, lawyers and victim-survivors. We see the effects of discrimination and sexual harassment on people every day. Our recommendations to improve the law are based on this direct experience.

This is why we are calling on the Australian Government to adopt an Equal Access costs model for all discrimination matters. This would allow people who experience discrimination and sexual harassment to recover their legal costs if successful. If unsuccessful, they would not be required to pay the other side's costs, with some limited exceptions such as for vexatious litigation. This model is similar to costs protections already available in whistleblowing law. Adopting this model would mean that people do not face a lifetime of debt simply for enforcing their rights.

Equal Access means:

- **People who experience the highest rates of discrimination and sexual harassment are supported to come forward without the risk of becoming bankrupt or having a huge debt simply for enforcing their rights.**
- **People who have experienced discrimination and sexual harassment can access legal representation.**
- **There will likely be more case law that sends the message that this behaviour is unacceptable, and will allow damages awards to better reflect community standards.**
- **We can ensure the new protections in the Sex Discrimination Act are upheld to better eliminate and prevent gender based discrimination.**

We can prevent and eliminate sexual harassment and discrimination but to do this we must remove barriers to accessing justice and support people who experience discrimination and sexual harassment to take action.

It's time for Australia to adopt Equal Access for discrimination claims.

Joint statement



List of Signatories (as at April 2023)

1. Accountability Matters Project
2. Associate Professor Alysia Blackham, University of Melbourne
3. Australian Centre for Disability Law
4. Australian Council of Trade Unions
5. Australian Education Union
6. Australian Lawyers Alliance
7. Australian Manufacturing Workers Union (AMWU)
8. Australian Nursing & Midwifery Federation
9. Australian Women Lawyers Ltd
10. Australian Workers Union
11. Carol Andrades, Senior Fellow, University of Melbourne
12. Caxton Legal Centre
13. Circle Green Community Legal
14. Community and Public Sector Union (PSU Group)
15. Community Legal Centres Australia
16. Community Legal Centres NSW
17. Domestic Violence NSW
18. Dr Belinda Smith, Associate Professor, Sydney Law School, University of Sydney
19. Dr Laura Hilly, Barrister, Victorian Bar
20. Dr Robin Banks, University of Tasmania and Director, Equality Building
21. Drummond Street Services
22. Electrical Trades Union of Australia
23. Emerita Professor, Margaret Thornton, Australian National University
24. Employment Rights Legal Service
25. Equality Rights Alliance
26. Fair Agenda
27. Finance Sector Union
28. Gender Equity Victoria
29. Grata Fund
30. Hall Payne Lawyers
31. Health Services Union
32. Independent Education Union of Australia
33. Inner City Legal Centre
34. Jen Hargrave, University of Melbourne
35. Justice Connect
36. Katherine Women's Information & Legal Service
37. Kieran Pender, Honorary Lecturer, ANU College of Law
38. Kingsford Legal Centre
39. Leah Marrone, Barrister, Flinders Chambers
40. Legal Aid NSW
41. Liam Elphick, Monash University
42. Mackay Regional Community Legal Centre
43. Maurice Blackburn Lawyers
44. Migrant Justice Institute
45. National Legal Aid
46. Northern Territory Legal Aid Commission
47. Professor Beth Gaze, Melbourne Law School, University of Melbourne
48. Professor Michelle Ryan, Australian National University and Director, Global Institute for Women's Leadership
49. Professor Nareen Young, Jumbunna Institute of Indigenous Education and Research
50. Professor Sara Charlesworth, Director of the Centre for People, Organisation & Work, RMIT
51. Public Interest Advocacy Centre
52. Redfern Legal Centre

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53. Sexual Assault Services Victoria
54. Sexual Assault Support Service
55. Shop Distributive and Allied Employees' Association (SDA)
56. South-East Monash Legal Service Inc.
57. Top End Women's Legal Service
58. Unions NSW
59. Unions NT
60. Unions Tasmania
61. United Workers Union
62. Victoria Legal Aid
63. Victoria Trades Hall Council
64. Villamanta Disability Right Legal Service
65. Western NSW Community Legal Centre
66. WestJustice
67. Wirringa Baiya Aboriginal Women's Legal Centre
68. Women Lawyers Association of NSW
69. Women with Disabilities Victoria
70. Women's Health Victoria
71. Women's Information and Referral Exchange Inc
72. Women's Legal Centre ACT & Region
73. Women's Legal Services Australia
74. Women's Legal Service NSW
75. Women's Legal Service Victoria
76. Working Women Queensland – Basic Rights Queensland
77. Working Women's Centre South Australia Inc
78. Young Workers Centre
79. Youth Law Australia

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Power to prevent



