THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
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Law Council of Australia
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By email: adam.fletcher@lawcouncil.asn.au

Dear Dr Popple,

An appropriate cost model for Commonwealth anti-discrimination laws

Thank you for the opportunity to contribute to the Law Council of Australia's submission to the Attorney General's Department in response to its *Consultation Paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* (**Consultation Paper**). The Law Society's Human Rights, Diversity and Inclusion and Employment Law Committees have contributed to this submission. The Law Society has also recently consulted the Grata Fund on the issues raised in this submission.

The Law Society is supportive of costs reform for Commonwealth anti-discrimination matters from the current provisions where 'costs follow the event'. It is well established that adverse costs risks in such matters create uncertainty for parties and represent a significant barrier to applicants from accessing protection under federal anti-discrimination law. This is particularly relevant for applicants whose financial situation may be impacted by multiple forms of social vulnerability, such as sex, race and disability.

For the reasons outlined below, we maintain the view that an 'equal access' approach will be more effective than a 'costs neutrality' approach in promoting access to justice, particularly for vulnerable individuals. Furthermore, we consider that such an approach responds in a more nuanced way to the economic and power disparities that often exist between applicants and respondents in these matters. We are also of the view that this approach will better promote compliance with anti-discrimination law, and create better conditions for its jurisprudential development.

The ability of applicants to obtain legal representation and fund litigation

The Law Society recognises that some stakeholders may argue in favour of a 'costs neutrality' regime to promote consistency of approach with the relevant costs rules under the *Fair Work Act 2019* (Cth). However, we consider that both the 'no costs'/'hard cost neutrality' and 'soft cost neutrality' approach will not adequately address the barriers for applicants to secure legal representation in anti-discrimination matters.

While the Consultation Paper suggests that the 'neutrality' models may encourage more public interest, pro bono litigation (with representative organisations having considerable

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certainty they will not face an adverse cost order), this does not take account of those persons who would be ineligible for legally aided or pro bono representation. Law Society members from plaintiff law firms have advised us that they would be reluctant to run speculative ('no win, no fee') cases under the 'costs neutrality' models as they will be unable to recoup their costs unless their client were successful, and damages were awarded that exceeded their costs.

In the context of the Law Council's previous work, including with regard to the 'missing middle' who are ineligible for access to publicly funded legal assistance, we consider than an 'equal costs' provision in discrimination matters should be supported from an access to justice perspective.

Fairness and the importance of systemic change

In our view, it is in the interests of fairness that a respondent who has been found to breach its anti-discrimination obligations is liable for the applicant's costs. The Australian Discrimination Law Experts Group, in its submission to the Senate Legal and Constitutional Affairs Committee, suggested that the respondent is typically a 'well-to-do business entity' that is able to receive a tax-deduction and absorb the cost of litigation as a 'legitimate business expense'.[1] Such options are generally not available to individual applicants.

There are frequently marked power and economic disparities between applicants and respondents. These are not confined to sexual harassment matters, but rather span the spectrum of anti-discrimination law, for example, the power imbalance between First Nations applicants and police in racial discrimination matters, or students and educational institutions in disability discrimination matters. Such disparities are particularly marked for applicants experiencing intersectional disadvantage.

While concerns are raised in the Consultation Paper with regard to respondents of lesser means (eg small hospitality or retail businesses and accommodation providers), we consider it appropriate, from the point of view of encouraging systemic change, that the 'equal access' approach will expose respondents to greater risk and therefore deter them from breaching their obligations under anti-discrimination laws.[2]

An 'equal access' costs model currently exists in whistleblowing law (including the *Public Interest Disclosure Act 2013* (Cth) and the *Corporations Act 2001* (Cth)). As noted in recent research conducted by the ANU, there are conceptual similarities between these matters and anti-discrimination matters, considering that complainants act in the public interest in bringing a claim and, in doing so, can catalyse social change.[3]

Development of anti-discrimination jurisprudence

The current costs regime not only acts as a barrier to individual applicants accessing protection under the federal discrimination framework, but also has broader consequences for the development of anti-discrimination law and legal principle.

If applicants are unable to access a judicial determination on their matter, the opportunity to develop relevant legal precedent is lost, along with any associated opportunity for systemic cultural and practice improvements in the broader community. A similar sentiment was expressed by Lord Reed (with whom Lord Neuberger, Lord Mance, Lord Kerr, Lord Wilson

[1] Australian Discrimination Law Experts Group, *Submission No 4 to the Senate Legal and Constitutional Affairs Committee, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (11 October 2022) 25 at [46].

[2] Australian Government, Attorney General's Department, *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination law*s (Consultation Paper, February 2023) 29.

[3] ANU (Margaret Thornton, Kieran Pender and Madeleine Castles), *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (October 2022) 101 at [36].

and Lord Hughes agreed) in the landmark decision of *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 who held:

> [69] Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance….The case also illustrates the fact that it is not always desirable that claims should be settled: it resolved a point of genuine uncertainty as to the interpretation of the legislation … which was of general importance, and on which an authoritative ruling was required.[4]

Further, confidence at the negotiation/conciliation stage of a matter that there is an opportunity for the matter to proceed to court further contributes to the fairness of the dispute resolution process.[5]

The fact only an estimated 2% of cases in the federal discrimination jurisdiction proceed to a formal hearing has led to significant gaps in the anti-discrimination jurisprudence, particularly matters pertaining to disability discrimination and racial vilification.[6] Further development of the case law in these areas would significantly assist claimants and their lawyers when assessing the merits of a claim.

The 'equal access' model, by mitigating the risk of an applicant being exposed to an adverse costs order almost entirely, is the best way to encourage applicants to pursue relevant matters in court. This, in turn, will contribute to the consistency and development of federal discrimination jurisprudence and lend applicants more certainty as regards remedies and avenues for relief.

Low risk of unmeritorious complaints

The Consultation Paper suggests that the 'equal access' model 'may encourage more unmeritorious complaints, given the financial risks and disincentive would shift primarily to respondents'.[7] We consider this disadvantage to be overstated. The 'equal access' model prevents a court from ordering an applicant pay the respondent's costs, except where the applicant has acted vexatiously or unreasonably in commencing the proceedings or in the way they conducted themselves during proceedings.

Further, the conciliation processes at the Australian Human Rights Commission should function, in the first instance, as an effective barrier against unmeritorious complaints. Under s 46PH of the *Australian Human Rights Commission Act 1986* (Cth), for example, the President is required to terminate the complaint if it is 'trivial, vexatious, misconceived or lacking in substance' (s 46PH(1B)) or if there is 'no reasonable prospect that the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) would be satisfied that the alleged acts, omissions or practices are unlawful discrimination' (s 46PH(1C)).

We consider that the above provisions would serve as appropriate safeguards against an influx of unmeritorious complaints.

Merits of other models

We maintain the strong view that the 'equal access' approach is most appropriate for the reasons set out above. If this approach is not preferred, we suggest there is some merit in consideration of the 'applicant choice' model. This approach recognises the realities of the different types of legal representation in anti-discrimination matters ('no win, no fee' versus community legal centre/pro bono representation). In the view of some of our members, however, this model may risk entrenching differential outcomes, whereby professional

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[4] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 at [69].
[5] Ibid at [72].
[6] Australian Discrimination Law Experts Group, Submission No 4 (n 1) 24 at [47].
[7] Australian Government, Attorney General's Department, Consultation Paper (n 2) 29.

workers represented by high-profile specialist claimant lawyers may be awarded damages far above the amounts awarded to vulnerable low-income workers (eg migrant workers or those in precarious work) with pro bono representation.[8]

If you have any further questions in relation to this letter, please contact Sophie Bathurst, Policy Lawyer on (02) 9926 0285 or by email: Sophie Bathurst@lawsociety.com.au.

Yours sincerely,

Cassandra Banks
President

[8] See, also, ANU, *Damages and Costs in Sexual Harassment Litigation* (n 3) 78 at [14].