

The Hon Mark Dreyfus KC MP
Attorney-General

4 November 2022

Senator the Hon Katy Gallagher
Minister for Women

Joint Letter – Costs Protections in Sexual Harassment Litigation

Dear Attorney-General, Minister,

We the undersigned are organisations and individuals involved in sexual harassment and discrimination litigation, as lawyers, law firms, academics, advocates, trade unions, health services and policy experts.

We welcome the Albanese Government's introduction of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (the Bill)*. The Bill is a landmark step towards implementing the recommendations of the Sex Discrimination Commissioner's *Respect@Work* report. The Bill will go a significant way to strengthening legal protections against workplace sexual harassment. We applaud the Government on its commitment to preventing and addressing workplace sexual harassment and other forms of discrimination.

However, we write to express our deep concern at the proposed amendments to the costs provisions in the *Australian Human Rights Commission Act 1986*. The Bill proposes a costs neutrality model, whereby litigants bear their own costs unless the court orders otherwise. The Bill provides that the court may make such orders as to costs as they consider "just" where "there are circumstances that justify it in doing so." The Bill sets out various factors the court must have regard to in making costs orders.

While superficially the arrangement represents an improvement on the status quo, its design and uncertainty around its operation will in fact serve to undermine access to justice. The proposed model will ultimately make it harder for targets of sexual harassment to vindicate their legal rights; it will deter women from pursuing cases and reduce the compensation that they will achieve if they do proceed. Taking a costs neutrality approach to a relationship that is characterised by endemic inequality only serves to entrench that inequality. The proposed approach will also make it uneconomical for law firms to offer no-win, no-fee arrangements in discrimination matters and make it unviable to bring class actions against employers.

We urge you to amend the Bill to include an "equal access" asymmetrical costs model. Such an approach would protect a complainant from an adverse costs order, unless they have acted vexatiously or unreasonably, but enable them to recover costs should they succeed. This model would recognise the significant inequality in resources between complainants in sexual harassment matters and their employers. It would also underscore the wider public interest in those who have been sexually harassed vindicating their legal rights.

We would recommend that the revised costs provision be modelled on equivalent provisions in the *Corporations Act 2001*. This model could be used for all anti-discrimination claims

(consistent with the Bill) or, as an interim measure, only apply to sexual harassment claims – to be followed by a comprehensive review of costs in anti-discrimination litigation.

The Bill is a great step forward in addressing the scourge of sexual harassment in our workplaces. We implore you not to allow a faulty costs provision to undermine its positive impact.

Kind regards.

Grata Fund

Public Interest Advocacy Centre

Australian Council of Trade Unions

Australian Women Lawyers Ltd

Women Lawyers Association of New South Wales

Working Women's Centre SA Inc

Australian Discrimination Law Experts Group (endorsed by)

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Ms Robin Banks, University of Tasmania

Dr Elizabeth Dickson, Queensland University of Technology

Mr Liam Elphick, Monash University

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Phoebe Wallish (Director of Business Development & Systems + General Manager Stepfamilies Australia)

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Helen Rimington (General Manager, Families, Youth and Communities)

Paula Fernandez Arias (General Manager Queerspace)

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Survivor advocate

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