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RACIAL JUSTICE CENTRE

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Attention: Attorney General Mark Dreyfus
Attorney General's Department
Respect at Work

RespectatWork@ag.gov.au

Dear Attorney General

Review into an appropriate cost model for Commonwealth anti-discrimination laws

Thank you for the opportunity to make submissions 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 Racial Justice Centre strongly supports cost reform for Commonwealth anti-discrimination matters from the current provisions where 'costs follow the event'. The risk of an adverse costs order poses a fundamental access to justice issue for diverse applicants – disincentivising and deterring meritorious complaints from being litigated and ultimately creating a barrier to any relief for victims.

The Australian Human Rights Commission ('AHRC') defines 'Accessibility', 'Comprehensiveness' and 'Intersectionality' as essential parameters of anti-discrimination law reform in the Free and Equal Report.[1] Where the value of *federal* discrimination law lies in its capacity to protect "all individuals and communities" and provide "remedial support to people in vulnerable situations",[2] we maintain that the interests of applicants vulnerable to multiple or intersectional disadvantage *must* be centred in the implementation of reform. On the grounds outlined below, we find that the 'Equal Access' approach to costs will bring the state of the law into greater conformity with these principles than the 'hard' or 'soft costs neutrality' models.

We would like to start by introducing ourselves. We are a community legal service established in 2022, advocating for an Australia where all people can live, thrive and enjoy life without racism. We are a not-for-profit charity established to eliminate racism and racial injustice through strategic ligation, education and transformation.

We welcome the Respect at Work recommendations, and we highlight it's at *intersection* of sexism and racism that is the critical juncture for some of the most harmful experiences of harassment, discrimination and exclusion.

1. Background

1.1. The Respect@Work Report recommended that the Government amend the *Australian Human Rights Commission Act 1986* (Cth) to insert a cost protection provision consistent with *Fair Work Act 2009* (Cth) s 570 (Recommendation 25). The amendment would have adopted the 'soft costs neutrality' model – expanding the court's discretion to order costs 'as it considers just', according to several mandatory factors. This provision was ultimately removed from the Draft Bill.

[1] Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (October 2019), 6.
[2] Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (October 2019).

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1.2. The Government noted the recommendation, stating that "the determination of costs orders is already at the discretion of the court, but [it] will review costs procedures in sexual harassment matters to ensure they are fit for purpose." However, our concern is that current cost procedures are not only unfit for the purpose of resolving sexual harassment and sex discrimination matters but fail to account for the even greater procedural injustice incurred by applicants who experience multiple forms of discrimination at once.

2. Prevalence of Intersectional Discrimination

2.1. The Consultation Paper confirms that the costs model that would be introduced would apply to discrimination complaints across all protected attributes. Reference is made to the interests of victims of 'endemic'[3] sexual harassment and sex discrimination. The AHRC in 2018 revealed that almost two in every five women are experiencing workplace sexual harassment.[4]

2.2. Race discrimination is an equally invidious and persistent phenomena, having doubled over the past decade (as of 2020).[5] Disadvantage on racial grounds operates as a barrier to employment and invariably has an economic dimension. A 2017 study on recruitment by the University of Sydney found that the call-back rate for interviews was three times higher for applicants with Anglo-Saxon sounding names than those with Chinese names.[6] Such findings complement a prior study by ANU that observed that Chinese, Middle-Eastern and Indigenous applicants must submit 68%, 64% and 35% more applications respectively to secure the same number of interviews as an applicant with an Anglo-Saxon name.[7] Entrenched racial bias has produced a workforce in which 95% of Australia's senior leaders are of Anglo-Celtic or European background.[8] These statistics operate at the daily level and dictate the financial realities for those racialised as 'other'.

2.3. It is well-established that economic disadvantage is most deeply embedded for applicants facing intersectional marginalisation. At the intersections of sex and race, Indigenous women and women of colour directly experience racism or discrimination at work at 2.6 and 2 times the rate of women of Anglo or European descent.[9] 60% of women of colour experience discrimination in the workplace according to the 2021 workplace survey by Women of Colour Australia. Culturally and Linguistically Diverse, 'CALD' women encounter additional obstacles at stages of recruitment and promotion for their accent or use of language.[10] A 2023 Diversity Council of Australia report found that 65% of CALM ('Culturally and Racially Marginalised') female respondents were given fewer career advancement opportunities and 42% had their work more closely

[3] Grata Fund Briefing Paper, *Access to Justice Amendment (Sex Discrimination)*, 23 July 2021.
[4] Australian Human Rights Commission, *Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018).
[5] Women on Boards, *Truth Be Told: Cultural Diversity on Australian Boards,* Sydney, Women on Boards Australia, 2022.
[6] Shyamal Chowdhury, Evarn Ooi and Robert Slonim, 'Racial Discrimination and white first name adoption: a field experiment in the Australian labour market' (Working Paper, The University of Sydney, June 2017) 19.
[7] Alison L. Booth, Andrew Leigh and Elena Varganova, 'Does Ethnic Discrimination Vary Across Minority Groups? Evidence From a Field Experiment' (2011) 74(4) *Oxford Bulletin of Economics and Statistics* 547.
[8] Australian Human Rights Commission, *Leading for Change: A Blueprint for Cultural Diversity and Inclusive Leadership Revisited* (2018).
[9] MindTribes, *Safer Workplaces for Women of Colour: Summary Report* (2021).
[10] MindTribes, *Levelling the Playing Field* (Culturally Diverse Women, 2018).

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scrutinised than other non-racialised women. [11] It's reported that acts of racism or discrimination manifest in the workplace by stereotyping women of colour, gaslighting the same women into doubting themselves, and deliberately limiting opportunities to advance women of colour by the 2021 report[12]. Further, the Respect @ Work report itself mentions that;

> *"An equally shocking reflection of the gendered and intersectional nature of workplace sexual harassment, [the] 2018 National Survey revealed, almost two in five women (39%) and just over one in four men (26%) have experienced sexual harassment in the workplace in the past five years. Aboriginal and Torres Strait Islander people were more likely to have experienced workplace sexual harassment than people who are non-Indigenous (53% and 32% respectively)[13].*

2.4. Alongside the many individuals experiencing multiple disadvantage, CALD and Indigenous women are more likely to experience exacerbated economic disadvantage. They are especially affected by and deeply implicated in efforts to reform the current costs model.

3. Current Costs Model for Federal Discrimination Complaints

3.1. The Consultation Paper establishes the Federal Court's broad discretion to award costs in discrimination proceedings – the most common order being that 'costs follow the event'. 90% of meritorious public interest cases are not being litigated because the current model is inclined towards adverse cost orders. [14] 56% of unsuccessful applicants in discrimination matters since 2001 have had to pay the opposing party's costs.[15]

3.2. Parties may apply for costs to be reduced in most discrimination matters where judgments are unlikely to exceed $100,000. [16] In reality, this affords little peace of mind to vulnerable applicants. Corcoran [2008] FAC 864 clarifies that:

> "…[M]ere concern as to the effect of an adverse costs order on a party's asset position or…that a party may become bankrupt if unable to meet a costs order are not, by themselves factors that sufficiently render the applicant's position different from other litigants faced with the usual costs order."

3.3. Similarly, the rare incidence of cost-capping orders detracts from the confidence of vulnerable litigants who wish to seek redress via litigation. The 'public interest' element that is required for a cost-capping order will be absent from many human rights proceedings[17] and "much diminished" in many discrimination matters which

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[11] Diversity Council of Australia, *Culturally and Racially Marginalised Women in Leadership: A Framework for (Intersectional) Organisational Action* (2023).
[12] *Safer Workplace for Women of Colour* by University of Melbourne, Community and Public Sector Union Victoria (CPSU) Victoria, and Mind Tribes (Report 2021)
[13] Australian Human Rights Commission, Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces (2018) 8.
[14] Senate Legal and Constitutional References Committee, Parliament of Australia, *Access to Justice* (Report, December 2009) 70-1 [4.30]-[4.31].
[15] Margaret Thornton, Kieran pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation* (Report, 25 March 2022) 14.
[16] Federal Court Rules 2011 (Cth) r. 40.08.
[17] Xiros v Fortis Life Assurance Ltd, citing Physical Disability Council of NSW v Sydney City Council.

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seek 'exclusively personal benefit' in the form of damages. [18]

4. Result

4.1. The current costs regime for discrimination matters violates principles of 'Accessibility' and 'Comprehensiveness' on multiple fronts. Applicants are severely disadvantaged in their ability to secure legal representation where recouping legal costs is contingent on a successful case and damages exceeding costs. Where discrimination matters are disincentivised on economic grounds, this leads to lower levels of jurisprudence, further uncertainty and perpetuates the existing unwillingness of financially vulnerable applicants to seek a judicial determination. As previously established, these inequitable consequences transpire most virulently amongst CALD women and other intersectionally disadvantaged applicants – the group in greatest need of the protection of federal discrimination legislation and for whom it must be necessarily intended.

5. 'Equal Access' Approach

5.1. Our Equal Access approach proposes to amend the *Australian Human Rights Commission Act 1986* (Cth) to remove the cost risk for applicants in all discrimination matters, especially those brought by individuals experiencing intersectional disadvantage. This model renders applicants immune from an adverse costs order, provided that they do not make frivolous, unreasonable or unfounded claims. Marginalised, financially vulnerable applicants will be afforded confidence to come forward, litigate meritorious cases and vindicate their right to protection under Australian federal law.

5.2. The Consultation Paper notes that the 'equal access' costs regime overcomes many of the inequities in the proposed 'soft costs neutrality' model. 'Equal access' presumes that the respondent will pay the applicant's costs and circumvents any reluctance of legal representatives to take on cases where the default is bearing one's own costs under 'soft' and 'hard costs neutrality'.

5.3. Reframing the adverse costs order as the exception, as opposed to the rule, provides the requisite certainty for vulnerable applicants to pursue litigation that is absent from 'soft costs neutrality'. At the same time, this makes room for pro bono or conditional costs cases that the 'hard costs neutrality' or 'no costs' model deters. In our view, accommodating these no win/no fee cases is particularly important in responding to the needs of intersectionally disadvantaged applicants and realising AHRC's principles of 'Accessibility' and 'Comprehensiveness'.

6. Impact of Reform

6.1. Concerns have been raised that the 'Equal access' model may bring about an increase in unmeritorious complaints. The Racial Justice Centre reiterates that complementary protections against vexatious claims exist in court statutes to sufficiently mitigate this risk; a complaint terminated because it is trivial, misconceived,

[18] Minns v New South Wales (No 2) [2002] FMCA 197.

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vexatious or lacking in substance, can only be filed subject to the court's leave.

6.2. Neither does the 'Equal Access' approach incentivise aggressive litigation strategies such as delay tactics, aiming to deplete the financial competence of the other party. This constitutes an improvement from the 'hard costs neutrality' model. Where less-resourced respondents are disfavoured by the 'Equal access' model, we maintain that they are better suited to shouldering the potential risk of an adverse costs order. Respondents should not receive any financial benefit from breaking what is fundamentally human rights law.

6.3. Assessed broadly, the 'Equal Access' costs model will be the most effective approach in realising the standards of 'Accessibility' and 'Comprehensiveness' set by the AHRC whilst maintaining the integrity of court processes. This reform will facilitate financial viability and access to justice for those at the nadir of social disadvantage. The Racial Justice Centre stands for the re-alignment of federal anti-discrimination legislation with those whose interests are most at stake.

7. Further Discussion

7.1. In line with Hon Mark Dreyfus KC, Attorney General's Kep Enderby Memorial Lecture in 2022 which expresses the intention to bring anti-discrimination protection in line with community expectations and ensure we are moving away from being safe but rather brave on all issues relating to racism and inclusion in Australia. Particularly in light of the forthcoming National anti-racism strategy. The Racial Justice Centre welcomes further discussion on discrimination law issues that include:

7.1.1. Shifting the burden of proof away from victims.
7.1.2. Transforming discrimination law to be intersectional.
7.1.3. Creating a positive duty for racial equality within the workplace.
7.1.4. Ensuring damages that reflect actual hurt and humiliation caused by discrimination.
7.1.5. Creating stronger victimisation provisions within the law.
7.1.6. Mandate that industry and government collect and report on the race and cultural background of Australian employees.

Thank you for the opportunity to make submissions on the review of an appropriate cost model for Commonwealth anti-discrimination laws. We look forward to ushering in a new era of equal access to relief for people who experience the indignity of harassment and discrimination.

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