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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House

Dear Committee Secretary

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

National Legal Aid (**NLA**) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry considering the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (the **Respect at Work Bill**).

Our submission is contained in this letter, which sets out:

- information about NLA and our members' expertise providing legal services to people who have experienced workplace sexual harassment
- our overarching comments about the Respect at Work Bill
- our recommendations to strengthen the Respect at Work Bill and enhance key protections (**Annexure 1**), and
- detailed consideration of the Respect at Work Bill provisions (**Annexure 2**).

National Legal Aid

NLA brings together the directors of eight state and territory legal aid commissions in Australia. Our organisations have extensive experience representing victims of sexual harassment and advocating for systemic changes to improve safety and access to justice in Australia. Our lawyers have specialist knowledge of sexual harassment and discrimination law, as well as a strong commitment to helping people resolve their legal problems and get a fair outcome.

For example, over the past five years Victoria Legal Aid's (**VLA**) specialist discrimination law service, the Equality Law Program, has provided over 6,720 legal advice sessions regarding discrimination matters, including over 1,000 advice sessions about sexual harassment and sex discrimination. VLA has also played a leading role in collaborative advocacy for reforms to prevent and address sexual harassment. This includes establishing the Power to Prevent coalition, an alliance of more than 60 diverse community organisations, unions, academics, peak bodies, health professionals, lawyers and victim-survivors, to inform the Australian Human Rights Commission (**AHRC**)'s Respect@Work: Sexual Harassment National Inquiry Report (**Respect@Work report**) and subsequent inquiries.

Legal Aid Queensland (**LAQ**), through its employment law and anti-discrimination advice service, provides advice and assistance to Queenslanders who have experienced sexual harassment and

sex discrimination in all areas of public life. LAQ has been involved in the Power to Prevent coalition and has contributed to advocacy and submissions relating to the Respect@Work report and recent review of the *Anti-Discrimination Act* 1991 (Qld).

We also note that VLA, Legal Aid NSW, Legal Aid WA and LAQ have received funding under the *National Legal Assistance Partnership 2020-25* Bilateral Schedule to provide front-line support to address workplace sexual harassment and have been expanding over the past 10 months in order to deliver these services. For example, Legal Aid NSW is establishing a new state-wide Respect at Work Legal Service (**RAWLS**) to provide legal services to people experiencing workplace sexual harassment and discrimination. RAWLS solicitors will work with Legal Aid NSW employment and human rights specialist teams to provide comprehensive advice and representation services. Community engagement officers will connect clients to RAWLS and assist with promotion and community legal education activities.

Each legal aid commission takes a client-centred approach when providing legal help, which places the client's interests at the centre and is responsive to their unique experience of discrimination, including intersectional discrimination.

NLA's overarching comments on the Respect at Work Bill

We commend the Respect at Work Bill for its comprehensive coverage of the outstanding recommendations for legislative reform in the Respect@Work report. This reform package marks a significant improvement in systemic efforts to prevent sexual harassment and ensure workers' safety and respect.

We particularly welcome the introduction of a positive duty on employers to prevent sexual harassment, greater enforcement powers for the AHRC, and longer timeframes for bringing a complaint. Together with partner organisations, the legal assistance sector has advocated for these reforms over many years.

NLA has identified 21 recommendations to strengthen the Bill and enhance key protections to ensure its successful implementation. These are set out in **Annexure 1**, with further detail regarding our practice experience and detailed positions in **Annexure 2**.

We note that we also look forward to reviewing the proposed amendments to the Fair Work system in response to Recommendation 28 in the Respect@Work report, which we understand are being progressed by the Minister for Employment and Workplace Relations.

Thank you for the opportunity to provide feedback on this important package of reforms. We would be pleased to give evidence at the hearings on 17 October 2022. Please contact Lucy Adams, Director, Civil Justice, VLA (03) 9269 0356 or lucy.adams@vla.vic.gov.au or Melanie Schleiger, Manager, Equality Law Program, VLA (03) 9269 0112 or melanie.schleiger@vla.vic.gov.au to discuss NLA's positions in more detail.

We look forward to supporting the next phase of implementation.

Yours faithfully

LOUISE GLANVILLE
Chair, National Legal Aid
CEO, Victoria Legal Aid

Annexure 1: National Legal Aid recommendations

These recommendations to strengthen the Respect at Work Bill and enhance key protections are informed by the experiences of our clients and lawyers, as well as engagement we have undertaken with stakeholders on these issues, including through the Power to Prevent coalition.

Objectives of the Sex Discrimination Act

1. Amend the objectives of the *Sex Discrimination Act* 1984 (Cth) (**the Sex Discrimination Act**) to refer to substantive *gender equality* as opposed to substantive equality between men and women.

Hostile work environment

2. Prohibit subjecting a person to an intimidating, hostile, humiliating or offensive environment on the basis of every attribute protected by the Sex Discrimination Act, not just sex.

3. Strengthen the proposed legal test for hostile workplace environments, including by more accurately capturing the nature of the wrong and explicitly recognising the unique and compounding effects of intersectional discrimination, by:

    a. replacing the circumstances to be taken into account in proposed section 28M(3) of the Sex Discrimination Act with the circumstances set out in section 28AA(2)(a) – (g) of the Sex Discrimination Act (as recommended by Australian Discrimination Law Experts Group (**ADLEG**)).

    b. replacing proposed sections 28M(2)(a) and (b) of the Sex Discrimination Act with the wording recommended by the ADLEG (see detail in Annexure 2).

Positive duty

4. Strengthen and simplify the positive duty at proposed section 47C by:
    a. requiring duty holders to take reasonable and proportionate measures to eliminate, as far as possible, conduct covered by subsection 47(2) and (4) without qualification;

    b. explicitly stating any exceptions to this obligation, noting our view is that exceptions should be kept to an absolute minimum; and

    c. removing the reference to ‘employers’ and ‘employees’, given they fall within the definition of persons conducting a business or undertaking (**PCBUs**) and workers.

5. Include in the factors, listed at subsection 47C(6), that may be considered in determining compliance with the positive duty:

    a. the consequences of not taking steps to eliminate sex discrimination, sexual harassment and other relevant conduct at subsection 47C(1); and

    b. whether the employer or PCBU consulted workers or other stakeholders in their effort to comply with the positive duty.

6. We recommend that the Simplified Outline should be consistent with the conduct covered in the Part and explicitly reference sexual harassment, victimisation and hostile workplace environments.

AHRC functions related to the positive duty

7. Remove from section 35B(1) the requirement that the AHRC must 'reasonably suspect' that a person is not complying with the positive duty for it to inquire into that person's compliance.

8. Require employers and PCBUs to periodically (at least every two years) report to their workers and the AHRC on their compliance with the positive duty.

9. Delay the commencement of the AHRC's monitoring and enforcement functions with respect to the positive duty by 18 months, instead of 12 months, to ensure there is sufficient time for employers and PCBUs to comply.

10. Specify that the federal courts can order employers or PCBUs to pay a financial penalty for failing to comply with a compliance notice.

11. Include compliance with guidelines issued by the AHRC as a relevant matter to be taken into account when determining whether an employer or PCBU has complied with the positive duty.

Systemic discrimination inquiry powers

12. Enable the AHRC to apply to the federal courts for orders following an inquiry into systemic discrimination, such as orders to prevent a contravention or redress the circumstances that have arisen as a result of the contravention.

13. Require that reports of inquiries conducted under the AHRC's systemic discrimination inquiry function be published either by the AHRC when finalised, or by the responsible Minister, within 10 sitting days of receiving the report.

Adequate resourcing for the AHRC

14. Ensure that the AHRC is appropriately resourced to enable the Commission to encourage best practice and facilitate compliance with the positive duty.

15. Ensure that the AHRC is appropriately resourced to undertake its proposed systemic discrimination inquiry powers.

Representative applications

16. Make explicit that representative applications can be brought by entities other than natural persons or trade unions, to ensure that advocacy organisations or other representative bodies can make representative applications.

17. Amend the *Australian Human Rights Commission Act* 1986 (Cth) to explicitly allow courts to order appropriate group-based remedies in the context of representative applications.

Costs

18. Replace the proposed cost protection provision with an asymmetric costs approach (also known as Equal Access costs model), which provides that:

    a. an applicant with a claim under the Sex Discrimination Act will not be liable for adverse costs except where the claim is vexatious or the applicant's unreasonable conduct in the course of proceedings has caused the respondent to incur costs; and

    b. where an applicant is successful, the respondent is liable to pay the applicant's costs.

19. In the alternative, amend section 46PSA(3) to be significantly more prescriptive to achieve the goal of providing applicants with greater comfort that a costs order will be made in their favour if successful and avoid unintended consequences. This requires, at a minimum:

    a. ensuring proposed section 46PSA(3)(c) – whether a person has been wholly unsuccessful in the proceedings – does not apply to applicants.

    b. ensuring proposed section 46PSA(3)(d) – whether any party has made a written offer to settle – does not apply to applicants.

    c. including an additional factor in proposed section 46PSA(3), which provides that if a party to the proceedings is receiving legal aid assistance, a costs order should only be made against that party in exceptional circumstances.

Victimisation

20. Replicate the victimisation provision in the Sex Discrimination Act in the *Race Discrimination Act* 1974 (Cth) (the Race Discrimination Act), the *Disability Discrimination Act* 1992 (Cth) and the *Age Discrimination Act* 2004 (Cth).

21. Clarify that the victimisation provision in the Race Discrimination Act applies to all areas of life in which race discrimination is unlawful.

Annexure 2: Practice experience and detailed responses

Objects of the Sex Discrimination Act

We welcome amendments to the Sex Discrimination Act to include substantive equality as an objective. However, we would encourage reframing of this provision to refer to substantive *gender* equality as opposed to substantive equality between men and women. 'Gender equality' is a more inclusive term that captures everyone protected by the Sex Discrimination Act, including people who are gender diverse or non-binary.

> **Recommendation 1:** Amend the objectives of the *Sex Discrimination Act* 1984 (Cth) (the **Sex Discrimination Act**) to refer to substantive *gender equality* as opposed to substantive equality between men and women.

Hostile workplace environments

NLA supports amending the Sex Discrimination Act to expressly prohibit subjecting a person to an intimidating, hostile, humiliating or offensive environment on the basis of sex. However, we have the following concerns about the proposed test as currently drafted.

1. It does not adequately acknowledge or address intersectional experiences of discrimination in two aspects:
    - It is limited to the ground of sex. The protection against hostile work environments should be extended to the additional attributes protected by the Sex Discrimination Act[1] for the purpose of consistency and in recognition of intersectional harassment and discrimination. This is particularly important given the findings, referred to in the Explanatory Memorandum, that certain workers, including LGBTI workers, are more likely to be harassed than others.
    - The circumstances that can be considered for the purpose of determining whether someone has subjected a person to a hostile work environment under section 28M(2) do not adequately acknowledge intersectional experiences of discrimination and harassment, particularly compared to sections 28A(1A) and 28AA(2)(a) – (g) of the Sex Discrimination Act.[2] It is well-established that young workers, Aboriginal and Torres Strait Islander workers, workers with disability, workers from low socio-economic backgrounds and workers from culturally and linguistically diverse backgrounds are more likely to be harassed and experience discrimination in unique, compounding and intersecting ways.

[1] This includes sexual orientation, gender identity, intersex status, marital or relationship status, potential pregnancy, breastfeeding, and family responsibilities.

[2] These circumstances include, but are not limited to:

a. the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
b. the relationship between the person harassed and the person who engaged in the conduct;
c. any disability of the person harassed;
d. any power imbalance in the relationship between the person harassed and the person who engaged in the conduct;
e. the seriousness of the conduct;
f. whether the conduct has been repeated;
g. any other relevant circumstance.

2. Clauses 28M(a) and (b) require that people must be in the same physical workplace at the same time. This would create an unnecessary hurdle and fail to recognise the reality of many modern work environments and the fact that harassment frequently occurs in online environments. The Fair Work Commission has recognised that being 'at work' is not limited to the confines of a physical workplace. A worker will be 'at work' at any time the worker performs work, regardless of their location or the time of day: *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2014] FWCFB 9227 at [48].
3. It frames the wrong as one person directly subjecting another person to harm, when the reality this is often not linear. In our experience, an environment that is hostile on the basis of sex and other attributes is rarely due to the actions or inactions of a single person. Rather, it often results from compounding conduct by multiple individuals, which combines to create a hostile environment that in turn is harmful to others. It is important that the provision captures conduct that contributes to the creation of a hostile environment, in circumstances where someone is harmed by that hostile environment.
4. It only captures circumstances where a person is subjected to conduct that may be 'offensive, humiliating or intimidating' to the person. This provision should also cover conduct that is otherwise hostile by reason of the sex of the person and/or other reasons set out in section 8A. For example, where access to suitable bathroom facilities was denied or obstructed, or other hostile conduct occurs.
5. More generally, in its current form, the Respect at Work Bill would establish three different sets of circumstances to be considered for three different types of harassment. This is unnecessary and confusing and could operate as a barrier to people accessing the strengthened protections set out in the Bill, and to employers and PCBUs taking the relevant steps to prevent hostile workplace environments.

Recommendation 2: Prohibit subjecting a person to an intimidating, hostile, humiliating or offensive environment on the basis of every attribute protected by the Sex Discrimination Act, not just sex.

Recommendation 3: Strengthen the proposed legal test for hostile workplace environments, including by more accurately capturing the nature of the wrong and explicitly recognising the unique and compounding effects of intersectional discrimination, by:

a. replacing the circumstances to be taken into account in proposed section 28M(3) of the Sex Discrimination Act with the circumstances set out in section 28AA(2)(a) – (g) of the Sex Discrimination Act (as recommended by the Australian Discrimination Law Experts Group (ADLEG)); and

b. replacing proposed sections 28M(2)(a) and (b) of the Sex Discrimination Act with the following wording (as recommended by the ADLEG):

    1) It is unlawful for a person to substantially contribute to the creation or maintenance of a workplace environment that is hostile on the ground of sex.

2) A person (the first person) substantially contributes to the creation of a workplace environment that is hostile, offensive, humiliating or intimidating to another person (the second person) if:

    a) a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the contribution would have resulted in the workplace environment being hostile, offensive, humiliating or intimidating to the second person by reason of:

        1. the sex of the person harassed; or
        2. a characteristic that appertains generally to persons of the sex of the person harassed; or
        3. a characteristic that is generally imputed to persons of the sex of the person harassed

The positive duty and related functions

We welcome the introduction of a positive duty on employers and PCBUs to take 'reasonable and proportionate measures to eliminate, as far as possible' unlawful discrimination and sexual harassment, along with the enhanced functions for the AHRC to support compliance. However, we would encourage strengthening the wording of the positive duty and the related AHRC functions.

Wording of the positive duty

We are concerned that the current provision setting out the duty is confusing and complicated.

We also consider that the matters set out in proposed section 47C(6) to be taken into account when determining compliance with the positive duty should include:

- the consequences of not taking steps to prevent discrimination, sexual harassment or victimisation,[3] given the primacy of this consideration to the objectives of the proposed provision; and
- whether the employer or PCBU consulted workers or other stakeholders in their effort to comply. This is important to ensure that employers and PCBUs implement preventive measures that are meaningful and targeted to address the sexual harassment hazards faced by their workers.

In addition, as it is currently drafted, the proposed section 47B Simplified outline of this Part (**Simplified outline**) refers to 'certain discriminatory conduct'. For clarity and completeness, we recommend that the Simplified outline should be consistent with the conduct covered in the Part and explicitly reference sexual harassment, victimisation and hostile workplace environments.

[3] For an example of a similar provision see *Equal Opportunity Act* 2010 (Vic) s19(2)(f)(ii) and (h).

Recommendation 4: Strengthen and simplify the positive duty at proposed section 47C by:

a. requiring duty holders to take reasonable and proportionate measures to eliminate, as far as possible, conduct covered by subsection 47(2) and (4) without qualification;

b. explicitly stating any exceptions to this obligation, noting our view is that exceptions should be kept to an absolute minimum; and

c. removing the reference to 'employers' and 'employees', given they fall within the definition of persons conducting a business or undertaking (**PCBUs**) and workers.

Recommendation 5: Include in the factors, listed at subsection 47C(6), that may be considered in determining compliance with the positive duty:

a. the consequences of not taking steps to eliminate sex discrimination, sexual harassment and other relevant conduct at subsection 47C(1); and

b. whether the employer or PCBU consulted workers or other stakeholders in their effort to comply with the positive duty.

Recommendation 6: We recommend that the Simplified Outline should be consistent with the conduct covered in the Part and explicitly reference sexual harassment, victimisation and hostile workplace environments.

AHRC functions related to the positive duty

We welcome the fact that the positive duty will be accompanied by a framework to promote compliance. We consider there to be six areas for improving this framework, including the AHRC's enforcement powers:

1. **Threshold for investigation:** The requirement that the AHRC must 'reasonably suspect' a contravention of the positive duty to conduct an investigation is likely to be prohibitive, particularly if employers and PCBUs are not required to routinely report to the AHRC on their compliance activities. We also note there is no requirement on other agencies or regulators to share relevant information with the AHRC. Where these information gathering functions are not supported or formalised, the AHRC's ability to properly oversee compliance will be hindered. Accordingly, we consider the AHRC should be empowered to conduct investigations without a need to suspect any non-compliance.
2. **Obligation to report or disclose:** Further, the Bill should require employers and PCBUs to routinely report to their workers and the AHRC on their compliance activities. Reporting requirements would provide the AHRC with another avenue to monitor and assess compliance, without the need to initiate what may be a more resource-intensive and/or prolonged investigation. Reporting and disclosure obligations, particularly for larger employers and PCBUs, will also ensure that workers and other stakeholders know what steps employers and PCBUs have taken to comply with the positive duty and how effective those steps have been. In this way, reporting and disclosure obligations are another important mechanism to ensure accountability and ultimately compliance with the positive duty.

3. **Timeframe for commencement of AHRC's new functions:** The AHRC's new functions to monitor and enforce compliance with the positive duty are proposed to commence 12 months after Royal Assent. Based on VLA's experience as a defined entity with obligations under the *Gender Equality Act* 2020 (Vic), we are concerned that this timeframe may not provide employers and PCBUs sufficient time to become compliant. Twelve months may also be insufficient time for the AHRC to develop the guidance, resources and training necessary to support compliance. It is our view that 18 months is more appropriate and will enable changes to be made in a more gradual way that is more likely to shift cultural norms and promote sustainable compliance with the new positive duty.
4. **Consequences for non-compliance:** The Bill should specify that the court can order employers or PCBUs to pay a financial penalty for failing to comply with a compliance notice. Efforts to persuade compliance with the law are more effective if they are backed by the prospect of consequences for non-compliance.[4] Without meaningful sanctions at the pointy end of the "enforcement pyramid"[5] the risks, and therefore the regulatory pressures, faced by recalcitrant employers or PCBUs are low. Civil penalties are a common feature of other regulatory regimes, particularly in the employment context.[6]
5. **Legal status of guidelines:** It will also be important for the Bill to articulate the legal status and effect of guidelines issued by the AHRC, so that duty holders have clarity on their legal obligations and the implications for non-compliance. For instance, the *Equal Opportunity Act* 2010 (Vic) provides that while practice guidelines are not legally binding, a Court or Tribunal may consider evidence of compliance with guidelines if relevant to any matter before it under the Act.[7] In the absence of such a provision in the Bill, the ability of the AHRC to encourage implementation of contemporary, best-practice prevention measures will be hindered. Duty holders may instead be persuaded to give greater weight to jurisprudence on existing, vicarious liability provisions. While we acknowledge the benefits of framing the positive duty in similar terms to the existing vicarious liability provisions, the AHRC should be empowered to set authoritative guidance on how they differ and the threshold for compliance.
6. **Educational functions of the AHRC related to the positive duty:** We consider that a supportive approach to implementation is essential. We are pleased to see that the AHRC will have functions to promote understanding and public discussion about the positive duty. To do this effectively, the AHRC must be resourced to develop its own capacity as well as the capacity of duty holders. This includes providing employers and PCBUs with the following support, in addition to guidelines on compliance:

[4] Ayres, I. and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).
[5] The "enforcement pyramid" was developed by Ayres and Braithwaite and applied to discrimination and sexual harassment laws by British academics Hepple, Coussey and Choudhury. It illustrates the actions that a regulator should be empowered to undertake in order to meaningfully enforce these laws:
At the base of the pyramid is persuasion, including education and training, followed by voluntary action plans; next is an investigation by a Commission which can enter into enforceable undertakings or issue compliance notices; at the top of the pyramid is prosecution and sanctions. See B Hepple, M Coussey T and Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (*Hart Publishing*, 2000) 58-59. See also I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (*Oxford University Press*,1992).
[6] *Fair Work Act 2009* (Cth) s546; *Occupational Health and Safety Act 2004* (Vic) s139.
[7] *Equal Opportunity Act 2010* (Vic) s149.

- template reports, policies, staff surveys, workforce communications and other documents that may be necessary to prevent sexual harassment and promote equality;
- training to support organisations to implement policies, comply with reporting requirements and create organisational change; and
- regular communications and support to assist with implementation.

We encourage the Bill to be amended to confer the AHRC additional functions so it is empowered to provide this support. The *Gender Equality Act* 2010 (Vic) provides a strong example.[8] While it is reasonable to expect the private sector to take the steps necessary to ensure compliance with the positive duty, the AHRC can and should take an important leadership role to encourage best practice and facilitate compliance for all defined entities, and must be resourced to do so.

Recommendation 7: Remove from section 35B(1) the requirement that the AHRC must 'reasonably suspect' that a person is not complying with the positive duty for it to inquire into that person's compliance.

Recommendation 8: Require employers and PCBUs to periodically (at least every two years) report to their workers and the AHRC on their compliance with the positive duty.

Recommendation 9: Delay the commencement of the AHRC's monitoring and enforcement functions with respect to the positive duty by 18 months, instead of 12 months, to ensure there is sufficient time for employers and PCBUs to comply.

Recommendation 10: Specify that the federal courts can order employers or PCBUs to pay a financial penalty for failing to comply with a compliance notice.

Recommendation 11: Include compliance with guidelines issued by the AHRC as a relevant matter to be taken into account when determining whether an employer or PCBU has complied with the positive duty.

Systemic discrimination inquiry powers

NLA welcomes the provisions that confer the AHRC with the ability to conduct systemic inquiries into unlawful discrimination. We consider this function will complement and bolster the AHRC's enhanced functions relating to the positive duty.

We have concerns, however, that there are currently no enforcement mechanisms available to the AHRC following such an inquiry. Inquiries of this nature require substantial resources over an extended period of time. Without any meaningful enforcement mechanism there is a risk that systemic, unlawful discrimination is identified by the AHRC but its recommendations for redress or compliance are ignored.

[8] Under section 32 of Gender Equality Act the Commissioner has the following functions:

a) to promote and advance the objects of this Act throughout the public sector;
b) to support defined entities to comply with this Act;
c) to provide advice to defined entities about the operation of this Act;
d) to establish and undertake information and education programs for defined entities in order to encourage best practice and facilitate compliance;
e) to undertake research into any matter related to the operation and objectives of this Act.

We encourage consideration of additional compliance mechanisms for the AHRC to support this function. For example, Part 9 of the *Equal Opportunity Act* 2010 (Vic) enables the Victorian Equal Opportunity and Human Rights Commission to conduct investigations into issues of systemic discrimination and refer a matter to the Victorian Civil and Administrative Tribunal following an investigation (among a range of other possible outcomes). If satisfied that a person has contravened the Act, the Tribunal can order that the person refrain from acting in contravention of the Act, do anything necessary to eliminate a future contravention, or redress circumstances that have arisen from the contravention.[9]

Enhanced compliance powers would strengthen the AHRC's ability to drive systemic change through this function and may avoid the need for multiple individual claims to obtain redress or remedial action for those impacted by the systemic unlawful discrimination. In order to fulfil these additional functions, the AHRC will require appropriate resources and funding.

Recommendation 12: Enable the AHRC to apply to the federal courts for orders following an inquiry into systemic discrimination, such as orders to prevent a contravention or redress the circumstances that have arisen as a result of the contravention.

Recommendation 13: Require that reports of inquiries conducted under the AHRC's systemic discrimination inquiry function be published either by the AHRC when finalised, or by the responsible Minister, within 10 sitting days of receiving the report.

Adequate resourcing for the AHRC

NLA welcomes the proposals to strengthen the provisions and the role of the AHRC in response to the Respect at Work recommendations. We reiterate that without adequate and targeted funding for the AHRC, there is a risk these legislative improvements will have limited practical effect. There are currently long wait times in the complaints resolution process at the AHRC. For example, Legal Aid NSW reports that it is taking up to 8 months from the time a complaint is lodged to assess the complaint and determine whether or not it should be investigated or conciliated. This timeframe is likely to affect complainant confidence in the AHRC process and may result in complainants seeking other, and possibly less effective, remedies in the hope of resolving the issue quickly, in order to move on with their lives.

In order to perform its additional enforcement, education and inquiry functions effectively, the AHRC must be appropriately resourced. As indicated above, meaningful consequences at the pointy end of the "enforcement pyramid"[10] are necessary to increase the regulatory pressures faced by recalcitrant employers or PCBUs, and to promote widespread compliance. With adequate funding, the AHRC can perform a critical role in encouraging best practice and compliance with the positive duty in a range of ways – from education to enforcement – and effectively undertake its proposed systemic discrimination inquiry powers.

[9] *Equal Opportunity Act 2010* (Vic) s141.
[10] Cf Footnote 5.

Recommendation 14: Ensure that the AHRC is appropriately resourced to enable it to encourage best practice and facilitate compliance with the positive duty.

Recommendation 15: Ensure that the AHRC is appropriately resourced to undertake its proposed systemic discrimination inquiry powers.

Representative applications

We strongly support the introduction of provisions that allow for representative bodies to make applications in the federal courts. This will overcome the existing procedural barrier that inhibits discrimination complaints made on behalf of a group of people proceeding to the federal courts, and more clearly reflects the systemic nature of discrimination. However, we recommend the following amendments to ensure the representative applications provisions are effective in achieving their purposes:

- Clarify that proposed section 46PO(2A)(c) enables representative actions to be brought by other entities in addition to trade unions. This will avoid protracted legal argument about this point, which is currently unclear, and ensure that other organisations that also have long histories of advocating on behalf of particular communities can bring representative actions.
- Amend the *Australian Human Rights Commission Act* 1986 (Cth) to explicitly allow for remedies appropriate for representative applications. As the provisions currently stand,[11] they largely allow for orders specific to individual applicants. This is at odds with the group-based and systemic nature of the discrimination complained of in representative applications. In such cases, decision-makers should be able to make orders that provide systemic redress and stop ongoing or future contraventions against the group.

Recommendation 16: Make explicit that representative applications can be brought by entities other than natural persons or trade unions, to ensure that advocacy organisations or other representative bodies can make representative applications.

Recommendation 17: Amend the Australian Human Rights Commission Act 1986 (Cth) to explicitly allow courts to order appropriate group-based remedies in the context of representative applications.

Costs protection provisions

In our practice experience, the principle that 'costs follow the event' discourages many victim-survivors of sexual harassment from taking legal action under the Sex Discrimination Act, particularly given the economic power imbalance between most complainants and perpetrators in the area of employment.

The Bill responds to this problem by requiring the parties to bear their own costs. However, failing to reward successful applicants with a favourable costs order also deters many applicants with meritorious claims of sexual harassment from seeking redress through litigation because of the significant risk that their own legal costs will be higher than any compensation awarded. There are

[11] See, for example, *Australian Human Rights Commission Act 1986* (Cth) section 46PO.

multiple examples of this happening – for example in the cases of *Tan v Xenos*[12] and *Richardson v Oracle*[13] (subsequently overturned on appeal).

It will also become more difficult for applicants in sex discrimination and harassment matters to secure no-win no-fee representation to pursue their claims.[14] It is important that applicants with claims under the Sex Discrimination Act have access to no-win no-fee representation because many people are not eligible for free legal assistance in this area, and commercial litigation funders do not fund sexual harassment matters. Accordingly, there are applicants who rely on no-win no-fee representation to enable them to pursue claims under the Sex Discrimination Act.

Although section 46PSA(2) provides courts with discretion to order costs, it is very unclear whether courts will order that unsuccessful respondents pay costs, even in circumstances where the amount of compensation awarded to a wholly successful applicant is less than their legal costs. We do not consider that this provision will provide applicants with greater certainty around the risk of an adverse costs order. As stated in the Explanatory Memorandum, there is already a broad judicial discretion to award costs in any manner seen fit, but it is rarely exercised.

Further, Victoria Legal Aid's family lawyers have observed that since the recent merger of the Family Court and the Federal Circuit Court there have been instances of legally aided clients being ordered to pay the costs of the other party,[15] despite the existence of a presumption that the parties bear their own costs and the requirement that the court consider whether a client is legally aided before departing from this presumption.[16] This observed trend is of particular concern given that the Explanatory Memorandum indicates that the cost provision proposed by the Bill is based on that contained in the AHRC's report, *Free and Equal: A Reform Agenda for Australian Discrimination Laws* (*Free and Equal Report*), which in turn is based on the relevant provision of the *Family Law Act 1975* (Cth), section 117.

In light of this trend, the lack of indication as to how each factor in proposed section 46PSA(3) should be weighted, and the absence of a factor that requires consideration of whether the party was legally aided, we are concerned that this section and sub-section 46PSA(3)(b) in particular could result in legally aided applicants being ordered to pay the respondent's costs, even in circumstances where they have acted reasonably.

We consider that proposed section 46PSA(3) needs to be significantly more prescriptive if it is to fulfil the goal of providing applicants with greater comfort that a costs order will be made in their favour if successful and will not be made against them, if they are unsuccessful.

Although the AHRC recommended this approach to costs in its *Free and Equal Report*, the views of a number of organisations that made submissions to the AHRC Free and Equal consultations have since evolved in light of the challenges identified above. There is now strong support among expert organisations for an Equal Access costs model (also known as an asymmetric system of costs allocation), which we recommend and discuss further below.[17]

[12] *Tan v Xenos* [2008] VCAT 1273.
[13] *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102.
[14] See, eg, Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Australian Discrimination Laws* (2022) 200.
[15] See, for example *Lawson & Glenning* [2021] FedCFamC2F 118. A costs order was also made against a legally aided party in an unreported decision of Justice Austin on 23 September 2021.
[16] *Family Law Act 1975* (Cth), s117(1).
[17] See, for example, Grata Fund, *The Impossible Choice: Losing the Family Home or Pursuing Justice – the Cost of Litigation in Australia* (2022).

Asymmetric costs model

The deterrent effect of the current costs rule could be ameliorated by implementing an asymmetric costs model (also known as an Equal Access costs model). NLA supports this approach, which would provide that:

- an applicant with a claim under the Sex Discrimination Act will not be liable for adverse costs except where the claim is vexatious or the applicant's unreasonable conduct in the course of proceedings has caused the respondent to incur costs; and
- where an applicant is successful, the respondent is liable to pay the applicant's costs.

This costs model ensures that respondents are not protected from paying costs where they have been found to have engaged in unlawful conduct. As a result, applicants are able to obtain legal representation on a no-win no-fee basis, as solicitors and barristers can still recover their costs where a case is successful. This model is already in use in Australia for cases involving whistle-blowers and a similar principle has been applied in employment discrimination cases in the US since 1978.[18]

When applicants are unfairly deterred from pursuing their claims in court, they are denied access to justice. This also contributes to a lack of judicial determination of sex discrimination and sexual harassment cases, resulting in a lack of precedent to aid in understanding and application of the law.

By removing a significant barrier to litigation for people with legitimate complaints of unlawful discrimination, the asymmetric/Equal Access costs model assists not only individual victim-survivors, but also serves the public interest by promoting more public accountability for contraventions of the Sex Discrimination Act.

Recommendation 18: Replace the proposed cost protection provision with an asymmetric costs approach (also known as Equal Access costs model), which provides that:

a. an applicant with a claim under the Sex Discrimination Act will not be liable for adverse costs except where the claim is vexatious or the applicant's unreasonable conduct in the course of proceedings has caused the respondent to incur costs; and

b. where an applicant is successful, the respondent is liable to pay the applicant's costs.

Alternative proposal

If the Bill's current framework for costs is retained, it should be significantly amended to address the concerns we have outlined above. In particular, it should not be relevant that an applicant has:

- been wholly unsuccessful in the proceedings. This fails to account for the fact that a lack of success in litigation could be entirely beyond the control of the applicant. In the absence of

[18] Ibid 5.

greater clarity around the weighting of this factor in particular, this could operate, in effect, as a 'costs follow the event' model.

- made a Calderbank-style offer in the course of proceedings. This is particularly relevant in contexts where individual and unrepresented applicants are engaged in litigation against represented employers or PCBUs such as large companies or government departments. The principles associated with deciding whether to make and accept offers in the course of litigation are complex and it would be unfair and contrary to anti-discrimination frameworks to penalise applicants for their lack of knowledge of Calderbank-style principles.

The costs model must also clarify that only in exceptional circumstances should applicants who are legally aided have costs orders made against them.

Recommendation 19: In the alternative, amend section 46PSA(3) to be significantly more prescriptive to achieve the goal of providing applicants with greater comfort that a costs order will be made in their favour if successful and avoid unintended consequences. This requires, at a minimum:

a. ensuring proposed section 46PSA(3)(c) – whether a person has been wholly unsuccessful in the proceedings – does not apply to applicants.

b. ensuring proposed section 46PSA(3)(d) – whether any party has made a written offer to settle – does not apply to applicants.

c. clarifying that only in exceptional circumstances should applicants who are legally aided have costs orders made against them.

Victimisation

We strongly support the proposal to make federal discrimination laws consistent by ensuring that victimisation under any of the federal discrimination Acts can form the basis of a discrimination action. We note however that the proposed victimisation provisions in the Sex Discrimination Act, *Race Discrimination Act* 1974 (Cth), the *Disability Discrimination Act* 1992 (Cth) and the *Age Discrimination Act* 2004 (Cth) differ significantly. This creates unnecessary complexity and misses an opportunity to streamline federal discrimination laws and promote consistency and accessibility. In addition, the victimisation provisions in the Race Discrimination Act are limited to the area of employment, when this limitation does not exist elsewhere in that Act.

Recommendation 20: Replicate the victimisation provision in the Sex Discrimination Act in the *Race Discrimination Act* 1974 (Cth) (the Race Discrimination Act), the *Disability Discrimination Act* 1992 (Cth) and the *Age Discrimination Act* 2004 (Cth).

Recommendation 21: Clarify that the victimisation provision in the Race Discrimination Act applies to all areas of life in which race discrimination is unlawful.