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position was in the Respect@Work Bill<sup>15</sup>. KLC and many other organisations including did not support this provision in the Bill. Our evidence is on record with the Committee as to why the provision was not sufficient to meet the requirement to provide access to justice for applicants.

Our concerns around costs neutrality includes:

- that it requires legal fees (including counsel) to be paid for from damages pay outs which we know in discrimination claims are often low or insufficient to justify taking action. <sup>16</sup> Damages for non-economic loss are “exponentially higher” in defamation than in discrimination highlighting the particular risks of discrimination litigation compared with other types. <sup>17</sup>
- it cost shifted inappropriately by asking the legal profession in many cases to



litigation. They are not appropriate in human rights matters where the applicant has been personally affected.

It is for these reasons that we do not support the AHRC's submission that s46PSA be amended to include the unreasonable rejection of settlement offer. (T)E6 (en1(m)3s)-2.1 (et)1en1(m)3s11 on











court<sup>37</sup>. There are many important public policy reasons in areas such as disability discrimination where we also need to see the same norm setting and clarity around the law through having matters going to court. It is desirable that we correct both the lack of matters going to court across all types of discrimination in order to improve the realisation of human rights in Australia.

- What about the impact on small to medium respondents – not everyone has deep pockets:

There are particular features of discrimination law which means it's appropriate that we depart from the normal rule of 'costs follow the event' which is more suited to other types of commercial matters. These are:

- discrimination law is important human rights law and is brought by individuals who have less resources than companies, or other bodies to bring litigation.
- people who experience discrimination and sexual harassment are more likely to experience socio-economic disadvantage and have less financial resources to fund litigation costs.
- this type of litigation is in the public interest and there are benefits overall to the community from the litigation.
- equal access applies where an applicant is successful. If the claim fails both sides bear their own costs (which is the same as 570 of FWA).

It is important to remember that costs become a live issue if the applicant succeeds in proving that unlawful discrimination has occurred. It is appropriate that there are consequences from this type of conduct.

#### Conclusion

KLC welcomes and supports this Bill and the development of an equal access model in discrimination law in Australia. This amendment is important to seriously address the concerns that the Respect@Work laid bare. We commend the Government for their consultation with organisations like KLC that work directly with people affected by discrimination and harassment.

Notwithstanding our recommendations on technical improvements, we support the passage of this Bill.

Yours sincerely,









imputed to the comparator are critical to whether cases succeed or fail. This test is complex and highly factually dependent.<sup>49</sup> Issues with the comparator test have been particularly highlighted in recent years under federal disability discrimination law.<sup>50</sup> The Respect@Work Report: National Inquiry into Sexual Harassment in Australian Workplaces (Respect@Work Report<sup>51</sup>) also highlighted the particular disadvantage that many sexual harassment applicants face in court, with verbal forms of sexual harassment being among the most common types of sexual harassment in workplaces, and often occurring in the absence of co-workers or other witnesses.<sup>52</sup> This creates a particular risk in litigation for these applicants, who may lack corroborating evidence for their case, or lose their case if respondents are found to be more credible than them. For many of our clients, the risk of losing in the Federal Courts and being liable to pay the legal fees of respondents is a major financial deterrent from litigating their discrimination cases in this jurisdiction.

As these reforms are being pursued in the context of implementing the Respect@Work Recommendations, it is also important to recognise the unique risks for working people and women especially, who may have some assets, or hope to increase their earning capacity in the future. A risk of a costs order, which can be pursued as a debt into the future can be a real concern for working women. Most women who experience sexual harassment at work are not “judgment proof” and therefore, must consider very seriously the risk of a costs order against them. This barrier is also compounded by other stressors in the lives of applicants, including the continuing impact of the discrimination, limited support networks, and their focus on trying to re-build their life. As Respect@Work highlighted there is a high mental and physical toll to experiencing sexual harassment and discrimination. We need to build access to justice systems that acknowledges this.

Julia’s story provides a particularly powerful example of how the cost risk on top of the life circumstances of applicants can prevent our clients from bringing federal discrimination complaints.

#### Case Study 1

In March 2021, Julia\*

F8-003 Kingsford Legal Centre | UNSW Law  
UNSW SYDNEY NSW 2052 AUSTRALIA  
T +61 (2) 9385 9566 | F +61 (2) 9385 9583 | ABN 57 195 873 179  
CRICOS Provider Code 00098G



It is also undesirable that applicants are deterred from bringing federal discrimination cases as federal discrimination law becomes even more robust. For example, in recent years the Sex Discrimination Act 1984(Cth) has been significantly reformed, including through the introduction of new stand-alone causes of action for sex-based discrimination and hostile workplace environments based on 0.004 Tw [(b).1 (r)-11.205 Td [(d)-4.3 (is)-4.1 ( 1.41 (



In recent years there have been significant amendments to the SDA, including the introduction of new forms of sex discrimination (sex -based harassment and hostile workplace environment based on sex) and a positive duty on employers to take measures to eliminate sex discrimination.<sup>59</sup> Now more than ever, federal discrimination laws must be revised to encourage litigation under these new provisions. If applicants and particularly lower socio-economic applicants are deterred from litigating these kinds of matters, these laws may have limited impact. Respondents will not be incentivised to follow these laws if there is limited risk that applicants will seek to rely on them to enforce their rights.

- Allows for limited exceptions for respondents to recover

KLC favours an Equal Access approach that allows respondents to make an application for a costs order only in circumstances where the “the court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause.” This would allow respondents in some matters determined to be vexatious or without reasonable cause to recover their costs. This would ensure a correct balance in providing disincentives for vexatious or doomed actions, as well as recognising the important public interest nature of this litigation and the general imbalance in resources. While the discussion paper outlines options under the Public Interest Disclosure Act 2013 (Cth) (Section 18)





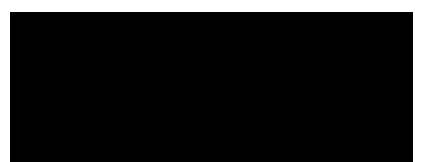




jurisdiction is complex and stressful, having to navigate a decision around costs and trying to seek expert advice to make this decision is likely to be overwhelming. It is likely that many applicants may make this choice without legal advice and may face difficulties later based on their choice.

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## List of Endorsements



Redfern Legal Centre



Employment Rights Legal Service



Women's Legal Service NSW



Inner City Legal Centre

HIV/AIDS Legal Centre

Women's Legal Services Australia

Community Legal Centres Australia

Community Legal Centres NSW

Caxton Legal Centre Inc

Working Women's Centre SA

Western NSW Community Legal Centre Inc

Mackay Regional Community Legal Centre Inc

Basic Rights Queensland Inc as Working Women Queensland

Job Watch Inc

Circle Green Community Legal



Australian Centre for Disability Law



Top End Women's Legal Service Inc