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Response to [Costs Inquiry #2: Australian Human Rights Commission Amendment \(Costs Protection\) Bill 2023 \(Cth\)](#)

The Working Women's Centre South Australia (WWCSA) is a gender focused, Community Legal Centre where women and vulnerable workers can easily access timely and accurate workplace information, legal and industrial advice. The unique community-based model means the WWCSA is focused on ensuring all women's voices can be heard, regardless of age, race, class, affiliation, or political conviction.

For their fortitude and achievements, the SA, NT and QLD Working Women's Centres (WWC's) were recognised as national finalists for the 2021 Australian Human Rights Award. These achievements include leading and contributing to campaigns relating, but not limited to, sexual harassment, workplace bullying, 10 days paid family violence leave, repetitive strain injury, parental leave, and universal accessible childcare.

The WWC's worked closely with Commissioner Kate Jenkins during the National Inquiry into Sexual Harassment in Australian Workplaces, resulting in the WWC's model being recognised as a holistic and intersectional service that supports women, their families, and the broader community. The effectiveness of the current WWC's model directly resulted in the inclusion of Recommendation 49 in the Respect@Work Report.

The WWCSA has three core arms of the service model, which includes:

- **Legal/Industrial:** Free legal/industrial service for non-unionised people (predominately women) who are low paid workers, vulnerable workers or women experiencing workplace issues including discrimination and harassment.
- **Advocacy:** Identifying trends and emerging issues advocating to influence change at the systemic level.
- **Education/Workplace training:** Free and fee for service training to employers, within the remits of funding that includes:
 - Employers in high-risk industries and workplaces,
 - Small businesses; and



- Universities, TAFE, and schools to inform young women entering the workplace of their rights.

The core practices of the WWCSA include:

- The advocacy and training work is informed by the issues experienced by the clients engaging with its legal service. These patterns are identified in the legal and industrial work, and the advocacy and education arms are used to address these issues at a systemic level.
- The WWCSA consistently and unreservedly work in a women's centered approach, applying a gendered lens to work issues. WWCSA is a safe place for women to gain support on issues such as domestic and family violence, sexual harassment, and assault. The WWCSA understands the gendered impact of family commitments, poverty, cultural background, and location on women's workplace choices.
- Women are supported and empowered through the legal and industrial work. Women are listened to and supported to make decisions that are right for them.
- Connection to grassroots movements. Communities are supported to address issues they are experiencing such as wage theft, discrimination, and exploitation. Connection is maintained with the community / women's service sector, unions, and campaigns to improve women's working lives.

Being actively involved in the sphere of unlawful discrimination law through legal representation, advocacy, and education, the WWCSA is overwhelmingly supportive of the 'equal access' costs model being incorporated in the Australian Human Rights Commission through the ***Australian Human Rights Commission Amendment (Costs Protection) Bill 2023*** ([Cth](#)).

This position of support for an 'equal access' costs model is informed by the WWCSA's observations and data collected through its dynamic model of service. The WWCSA supports the proposed costs model, with reasons set out as follows:

- **Power Imbalance and Financial Barriers**
Workers who possess one or more protected attributes are inherently vulnerable in society and in turn, at work. This was reflected in the Respect@Work report which demonstrated that vulnerable workers are increasingly more likely to experience sexual harassment in the workplace. These vulnerabilities can often create a barrier for Complainants to engage in litigation, in addition to the imbalance of power dynamics and disparity of financial recourses that exist between Complainants and Respondents.



The current costs model facilitates a further financial barrier for Complainants to pursue their matters in court, as the fear of adverse costs orders being made is a large deterrent in bringing forward unlawful discrimination claims.

The disparity of financial resources between employers and employees can be exemplified in the case of Sally*.

Sally* was a migrant worker who was pregnant at the time of her dismissal and was escaping family domestic violence. A portion of her claim related to pregnancy discrimination. Sally's visa conditions meant that she was not entitled to social security payments, and therefore was experiencing significant financial hardship because of her dismissal. The WWCSA represented Sally in the FWC in a General Protections involving dismissal claim. Sally would not have been able to afford private legal representation in her circumstances. In comparison, the Respondent was represented by a private lawyer in conciliation. This is a clear example of the financial disparity that can exist between employees and employers. Sally received \$10,000 in settlement of her matter which eased her immediate financial hardship. * *Pseudonym*

- **Role of Case Law in Unlawful Discrimination Proceedings**

The lack of case law as a result of these abovementioned financial barriers further perpetuates inequality in legal proceedings. Should conciliation be unsuccessful, and to proceed with unlawful discrimination cases past conciliation, it is essential for complainants and/or their legal representatives to have recent legal precedent that reflects society's changing standards in respect to unlawful discrimination.

Even if there were to be an initial increase in litigation as a result of this model, development of case law in the area of unlawful discrimination will facilitate earlier settlements in due course, as Judicial consideration and decisions on relevant legal tests are crucial to enable accurate interpretations of the law.

This current deficiency of comprehensive case law in unlawful discrimination matters makes it difficult for complainants to weigh up the stressful nature of litigation against likely outcomes of their case. This lack of case law disempowers complainants in their decision making on whether they want to persevere through stressful litigation and what the risk versus reward may be in pursuing their matters.

- **'Equal Access' Model as a Solution**

The objective of the Respect@Work Report's recommendation 25 would be achieved through adoption of the 'equal access' model. It will break down the financial deterrents and barriers for Complainants to proceed with unlawful discrimination claims. It is fundamental to the rule of law that all persons, regardless of financial circumstances, are entitled to access to justice and fair treatment before the law. To achieve this, addressing financial barriers and deterrents is crucial.



An example of the importance of costs protection can be exemplified in the case of Fiona*.

The WWCSA represented Fiona in the Fair Work Commission (FWC). Fiona* is a 62-year-old woman who made a General Protections involving dismissal claim on the basis of unlawful disability discrimination. Her matter did not settle in conciliation in the FWC. The Applicant pursued her matter in the Federal Circuit Court. At the time when considering whether to pursue her case to the Federal Circuit Court, Fiona was reassured by the FWC costs rules applying to her when filing in the Federal Circuit Court. As a result of pursuing her matter past the FWC unsuccessful conciliation, Fiona received \$20,600 in settlement of her disability discrimination matter.

* Pseudonym

The WWCSA supports this 'equal access' model in unlawful discrimination matters of **all** kinds (whether this be sexual harassment, sex, disability, race, pregnancy, family responsibilities or otherwise).

- **Rebuttal to the 'Unmeritorious Claim' Concerns**

A concern raised by opposers of the 'equal access' costs protection model is the argument that adoption of the model would facilitate unmeritorious claims to progress in the courts. Under the current framework in the Australian Human Rights Commission (AHRC), discretion exists to address vexatious and/or unmeritorious claims. Ultimately, the introduction of 'equal access' costs protections would not undermine this existing discretion on the AHRC to dismiss complaints without merit and/or of a vexatious nature. This model would only benefit aggrieved individuals who have experienced unlawful discrimination to have their case heard where their case is deemed meritorious.

As the costs provisions current stand in the AHRC, a lack of financial resources and systematic disempowerment is actively working against vulnerable Complainants, who are most prone to unlawful discrimination, in pursuing litigation of their matters.

The WWCSA is a signature to the submission of the Power2Prevent Coalition and endorses their submission in addition to our submission above.

Working Women's Centre SA
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Yours faithfully



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