Full Stop Australia

Human Rights Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

14 April 2023

By Email: RespectatWork@ag.gov.au

Dear Sir/Madam

Re: Review of an appropriate cost model for Commonwealth anti-discrimination laws

Thank you for giving Full Stop Australia the opportunity to participate in the roundtable discussion on the above issue held on 12 April 2023. Since attending that discussion, we have undertaken further research and thinking, and consequently resolved that the 'asymmetrical cost model' is our preferred model for awarding costs in Commonwealth anti-discrimination matters that proceed to court. Our feedback on this and other issues raised in consultation is set out below.

About Full Stop Australia (FSA)

FSA is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic, and family violence since 1971. We perform the following functions:

- Provide expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic, or family violence, and specialist help for their supporters and those experiencing vicarious trauma;
- Conduct best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector; and
- Advocate with governments, the media, and the community to prevent and put a full stop to sexual, domestic and family violence.

FSA, as a national service, draws upon the experiences of our trauma-specialist counsellors to support people impacted by sexual, domestic and family violence across jurisdictions, as well as our clients and other survivor advocates who are part of our National Survivor Advocate Program, to advocate for victim focussed laws and consistent approaches to family, domestic and sexual violence nationally.

FSA supports an 'asymmetrical cost model'

FSA shares the concerns raised in the Government's *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws* about the current cost model for Commonwealth anti-discrimination matters that proceed to court. In particular, FSA agrees that broad judicial discretion gives rise to a lack of certainty about how costs will be awarded, which can disincentivise applicants who have experienced discrimination or harassment from pursuing litigation. We agree that reform is needed to address this issue.

FSA's preferred cost model is the 'asymmetrical cost model,' whereby:

- a respondent bears an applicant's costs by default where the applicant is successful in legal proceedings concerning unlawful discrimination or harassment;
- parties bear their own costs where the applicant is unsuccessful in the proceedings; and
- a court may order the applicant to pay the respondent's costs where the applicant acted vexatiously or unreasonably in commencing the proceedings or in its conduct during the proceedings.

FSA favours this model because it appropriately reflects the power imbalance that generally exists between applicants and respondents in discrimination and harassment matters. It is the most effective model for overcoming barriers faced by applicants in proceeding to court, by mitigating the risk of an adverse costs order in most cases (while containing an appropriate carve-out for vexatious or unreasonable conduct by an applicant). Finally, it offers a good deal of certainty regarding how costs orders will be made.

If the 'asymmetric cost model' is not adopted, however, FSA prefers the 'soft cost neutrality' model to 'hard cost neutrality.' The former is more flexible in allowing the court to consider important access to justice principles – such as whether there is an imbalance of power between parties to litigation, or a public interest in a matter being heard – when deciding whether to make a costs order. It also provides greater scope than the 'hard cost neutrality' model for applicants to recover their costs, with broader judicial discretion.

Recommended settings under the 'soft cost neutrality' model

If the 'soft cost neutrality' model is adopted, it is important that legislative settings for the award of costs appropriately reflect the human rights objectives of anti-discrimination legislation.

The criteria proposed in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (in a provision removed prior to the Bill's passage) are:

- the financial circumstances of each of the parties to the proceedings;
- the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission);
- whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings, or the matter the subject of the terminated complaint, and if so, the terms of the offer;
- whether the subject matter of the proceedings involves an issue of public importance; and
- any other matters that the court considers relevant.

FSA recommends the following amendments to these criteria. These changes are designed to ensure that vulnerable people who have experienced harassment or discrimination are not unjustly deterred from bringing court proceedings, and that the court's consideration of costs is focused on ensuring access to justice.

Criterion	Recommended change
The financial circumstances of each of the parties to the proceedings	FSA supports a court being able to consider the financial circumstances of an applicant in discrimination or harassment proceedings, particularly where there is a significant financial imbalance between applicant and respondent (for example, if the respondent is a well-resourced corporate entity). However, requiring the court to consider the financial circumstances of the respondent seems inconsistent with the beneficial purpose of anti-discrimination legislation. This may also have the absurd effect of disincentivising a person who has experienced harassment or discrimination from bringing an application against an impecunious respondent, due to concern about having costs awarded against them. If the intention of this provision is to enable the court to consider a power imbalance, or specifically a financial imbalance, between an applicant and respondent, we recommend recasting the provision in these terms.
Whether any party to the proceedings has been wholly unsuccessful in the proceedings	FSA recommends recasting this criterion to ensure that it does not capture applicants who have brought legal proceedings in good faith, based on a genuine experience of discrimination or harassment. This criterion appears to capture any unsuccessful proceedings, including where there is no evidence that a claim was lacking in substance, misconceived, frivolous or vexatious. An applicant may have genuinely experienced discrimination or harassment, and nonetheless be unsuccessful in court proceedings. For example, if there are no other witnesses to the conduct in question, a court may be unable to make a finding of discrimination or harassment to the requisite standard of proof. Enabling a costs order to be made against an applicant in these circumstances may deter applicants from pursuing litigation following genuine experiences of harassment or discrimination.
Whether a settlement offer has been made, and the terms of the offer	FSA is concerned that this provision could incentivise an applicant to accept an unjust or unfavourable settlement offer, because they are worried that failing to accept the offer could lead to an adverse costs order. This risk is particularly pertinent, given the power and resourcing imbalance between applicant and respondent that typically exists in discrimination and harassment matters. While considering past settlement offers to determine costs may be appropriate in commercial litigation between equally well-resourced parties, FSA queries its utility in the context of beneficial legislation designed to enable members of the public to assert their human rights. The above risk could be mitigated by recasting this criterion in terms of whether a party has unreasonably prolonged proceedings. FSA notes that legislation in NSW and Victoria on the award of costs in discrimination proceedings contains a provision in these terms: see *Civil and Administrative Tribunal Act 2013* (NSW) s 60 and *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109.

Additional funding to frontline sexual violence services is required to ensure adequate ongoing support is available to victims of sexual harassment and assault

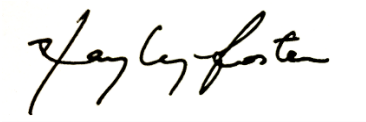
Finally, we wish to raise an additional but related concern regarding the need for additional funding for frontline sexual violence services.

We are aware that additional resources have been provided to 1800 RESPECT – the national domestic, family and sexual violence telephone line – to respond to sexual harassment. However, there has been no corresponding funding increase related to these issues frontline referral agencies, specifically sexual violence services such as FSA.

We support the increase in funding to 1800 RESPECT. However, as 1800 RESPECT generally provides one-off, short-term intervention, this does not address demand for ongoing support. Where ongoing trauma counselling is required, referrals are generally made to sexual violence services such as FSA. Without increased funding, these already overburdened and underfunded services will have to stretch themselves further to provide additional support. This is an unsustainable situation, which leads to inadequate support being available to victims of sexual harassment and assault.

If you have any questions in relation to the issues raised in this letter, please do not hesitate to contact our Head of Advocacy, Emily Dale, at emilyd@fullstop.org.au.

Yours faithfully,



Hayley Foster
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Full Stop Australia