Media Release

Law Council
OF AUSTRALIA

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Equal-access model not the answer to encouraging legitimate discrimination claims

The Law Council of Australia does not believe an equal-access model, as currently being considered by Parliament, is the best way to encourage Australians to pursue legitimate discrimination claims.

“The commendable objective of the Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) is to address the risk that the possibility of facing an adverse costs order may discourage an individual from commencing a federal discrimination proceeding,” Law Council of Australia President, Mr Greg McIntyre SC said.

Appearing before the Senate Legal and Constitutional Affairs Committee yesterday, the Law Council noted that the intent of the Bill is to protect applicants from adverse costs orders in most circumstances, including where their claim is dismissed. An adverse costs order means the applicant must pay their own and the respondent’s legal costs.

“Our legal system must not deter victim-survivors of sexual harassment and other forms of discrimination from holding their persecutors to account,” Mr McIntyre said.

“However, this Bill tilts the balance in such a way that it could increase unmeritorious claims and reduce incentives for parties to engage genuinely with the Australian Human Rights Commission’s (AHRC’s) conciliation processes and, later, in any alternative dispute processes available in the courts and settlement negotiations.

“This model would undermine equality before the law, and interfere with the courts’ discretion to award costs in the interests of justice, as well as with the efficient management of cases. It lacks a precedent in other Australian discrimination law jurisdictions and was not recommended by the AHRC’s *Respect@Work Report*.

“The Law Council acknowledges that, particularly in the workplace, there is often a power imbalance in favour of employer respondents in discrimination claims. While the goal is to prevent David versus Goliath legal battles, discrimination law is about much more than just unfair treatment of employees. The four federal anti-discrimination Acts apply to the areas of education, accommodation, provision of services, clubs and sport. The discrimination laws cover racial hatred, victimisation and other forms of harassment. In these areas, respondents may be individuals, small businesses or community organisations.

“The Law Council has instead recommended what we are calling a ‘broad-discretion’ model. Under this model, costs would still follow the event by default, but the courts would have to consider whether to depart from this position, taking into account a range of relevant factors to help ensure that the eventual costs order is as fair as possible. Applicants would still bear some risk, but would have certainty that their personal circumstances would be taken into account.”

In its submission to the Senate Inquiry, the Law Council also noted that the risk of adverse costs orders is only part of a large, complex picture when it comes to the effectiveness of Commonwealth discrimination law in protecting victims of sexual harassment and discrimination. Stronger roles for relevant non-court institutions, increased availability of legal aid and judicial education are also important.

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