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Submitted to Respect@Work – consultation on remaining legislative recommendations
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Questions about you

1 What is your name?

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2 What is your email address?

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3 Who are you making this submission for?

Organisation (including Commonwealth, state, territory or local government agency)

4 What is your organisation?

Organisation:
WESTERN COMMUNITY LEGAL CENTRE LIMITED (WEstjustice)

5 What sector is your organisation a part of?

Legal sector

Other (please specify):

6 What is your position in the organisation?

Position:
Program Manager

7 Where do you live/where is your organisation based?

VIC

8 What is your gender (if you are submitting on your own, or another person's, behalf)?

Female

9 Making your submission public

I agree to my submission being made public under my/my organisation's name

Issue 1: Recommendation 16(c) – Hostile work environment

1 What are your views on amending the Sex Discrimination Act to prohibit the creation or facilitation of a hostile work environment on the basis of sex?

Support amending the Sex Discrimination Act to prohibit the creation or facilitation of a hostile work environment on the basis of sex

Please expand on your response:

A hostile work environment (as defined in the question) and where the hostility is on the basis of sex (i.e non-sexual but sexist behaviour), it can exclude, demean and objectify workers, particularly women and gender diverse individuals.

Behaviours in a hostile work environment may not be targeted at a particular individual and therefore may fall below the standard required for a claim of sexual harassment under the Sex Discrimination Act. However, hostile work environments on the basis of sex can lead to and facilitate sexual harassment and entrench gender inequity in the workplace. This is illustrated in the following case study example about one of our clients.

Olga (not her real name) was a young international student living in Melbourne's West. She was a casual employee and one of the only females at her workplace. Throughout her employment, Olga was bullied and called sexist slurs such as 'dumb c***' and 'lazy c***' by others. Throughout her employment, Olga was subjected to repeated sexual harassment. This included unwelcome comments about her looks and unwelcome sexual advances from multiple different male colleagues, as well as being shown photos of a sub-contractor's genitals.

Olga was also subject of conduct falling short of sexual harassment, which nonetheless had an impact on her psychological health. For example, a number of colleagues spread rumours about Olga's sex life, including that she had slept with, or was interested in sleeping with, a number of male colleagues.

WEstjustice assisted Olga to make a discrimination and sexual harassment complaint and obtained a successful outcome by way of negotiated settlement. However, Olga's experience illustrates that experiences of sexual harassment can be accompanied by a hostile work environment on the basis of sex, an aspect that is not currently adequately captured by the Sex Discrimination Act.

Further, Olga's experience included various other conduct that was likely to have been considered unacceptable on the basis of her sex in reasonable public opinion but fell below the legal definition of sexual harassment (e.g. spreading rumour about Olga's sexual interests). This illustrates the importance of amending the Sex Discrimination Act to prohibit the creation or facilitation of a hostile work environment on the basis of sex. Often individual instances of sex-based harassment may not meet the threshold of sexual harassment or sex discrimination as currently defined in the Sex Discrimination Act but the cumulative impact of a series of conduct on an individual can be equally significant. This not currently reflected in the Sex Discrimination Act. A prohibition on creation or facilitation of a hostile work environment is a step towards addressing this gap.

When introducing this proposed amendment to the Sex Discrimination Act care should be taken so as not to prejudice LGBTQI+ workers especially trans and gender diverse workers. The object of the Act or the proposed amendment should make it clear that the amendment is not intended to capture circumstances where an LGBTQI+ worker is expressing their identity, or accessing benefits available to non-LGBTQI+ employees, or where an employer is taking steps to make their workplace more inclusive for LGBTQI+ workers.

For example, it should be made clear that a hostile work environment on the basis of sex would not generally arise in circumstances where:

(a) a transgender employee is permitted using the bathroom that corresponds to their gender identity, or an employer institutes gender-neutral bathrooms;

(b) an employer displays posters, flags, or other public indicators that they support and welcome trans and gender diverse customers or clients;

(c) a gay colleague discusses his upcoming marriage with co-workers; or

(d) an employer implements a policy that requires all employees to use a non-binary employee's correct pronouns.

2 If you SUPPORT this proposal, what are your key reasons?

The current law requires clarification and this proposal would fill a gap that exists in the current legal frameworks, People who are exposed to sexual conduct, but who are not the direct target, are currently not clearly covered by the sexual harassment provisions in the Sex Discrimination Act and should be, A legislative change would send a strong message to people in the workplace about their obligations and role in preventing sexual harassment, The Australian Human Rights Commission should have a clear responsibility in relation to this type of conduct, in addition to complaint mechanisms and remedies available under other existing frameworks, Other

Please expand on your response:

All of the above reasons are relevant and important. The case study of Olga summarised in question one illustrates that some behaviours (e.g. spreading rumours on the basis of sex) are not captured by the current definition of sexual harassment under the Sex Discrimination Act. The current definition is limited to unwelcome sexual advances, requests for sexual favours or unwelcome conduct of sexual nature. Rumours intended to exclude and humiliate an individual on the basis of sex are not captured. While malicious rumours may be classified as "bullying", this lacks recognition that the conduct is motivated on the basis of sex and that there are gendered drivers of sexual harassment and hostile work environments.

Further, it is important to note that individuals facing a hostile work environment on the basis of sex are likely to be disempowered. They are unlikely to access or utilise internal complaint mechanism without fear of exacerbating their situation or being victimised. WEstjustice's clients that particularly come from disadvantaged backgrounds are vulnerable to being caught up in such disempowering situations. Capturing hostile work environments on the basis of sex in the Sex Discrimination Act will provide a tangible route to address these types of situations. This is very important to empower victims of sex-based harassment.

3 If you DO NOT SUPPORT this proposal, what are your key reasons?

Please expand on your response:

4 Which of the following workplace roles or positions, if any, should a prohibition on creating or facilitating a hostile work environment apply to?

Executive leadership (senior managers, leaders), All individual/s who contribute towards creating or facilitating an intimidating, offensive, humiliating and hostile work environment

Please expand on your response:

All individuals should have a responsibility not to create or facilitate an intimidating, offensive, humiliating and hostile work environment. The Sex Discrimination Act should provide for individual (personal) liability, accessorial liability (under s105), and vicarious liability (under s106) for the creation of a hostile work environment on the basis of sex.

The prohibition should also establish liability for those who know or should know about the hostile work environment and take no action or take

insufficient action to prevent it from occurring. Executive leadership, senior managers and leaders should have an added responsibility to ensure that appropriate processes are in place to prevent the creation of an intimidating, offensive, humiliating and hostile work environment.

The current accessorial liability and vicarious liability provisions in the Sex Discrimination Act do not extend to the creation and facilitation of a hostile work environment. Further, there is no obligation in the Sex Discrimination Act to take any preventative measures to avoid the creation and facilitation of a hostile work environment.

Individual liability is an important aspect for those who have experienced sex-based harassment. Individual accountability and acknowledgement of any harm perpetrated by individuals are important considerations for victims. Further, many of our clients work in small businesses where companies may not have large resources to defend or compensate claims for sex-based harassment. In those circumstances, individual liability and accountability has an added significance.

Issue 2: Recommendation 17 – Positive duty

1 What are your views on introducing a positive duty into the Sex Discrimination Act to prevent sexual harassment from occurring in Australian workplaces?

Support introducing a positive duty into the Sex Discrimination Act

Please expand on your response:

A positive duty is very important to our clients because it will place the responsibility on employers to take action to prevent sexual harassment and sex-based harassment in a more constructive, transparent and tangible way than the vicarious liability requirements.

Our clients are young, international students or from refugee and migrant communities. They are often in insecure work, on temporary visas and may not understand their legal rights. Our clients are often not able to advocate in their interest or raise concerns of sexual or sex-based harassment. A positive duty will have the effect of placing the burden on employers take steps to prevent sexual harassment and sex-based harassment.

Our clients are often engaged in insecure forms of work (e.g. labour hire arrangements and independent contractor arrangements). They may not always have an employer that is easily identifiable. Therefore, we consider that to protect these workers, a positive duty should be an obligation imposed on all persons and entities in charge of a workplace rather than being limited to the employer.

2 If you DO support the introduction of a positive duty into the Sex Discrimination Act, what are your key reasons?

Promote a culture of prevention in workplaces – the proposal would contribute to cultural change around addressing sexual harassment, promoting a preventative approach rather than a reactive, remedial one, Capacity to address systemic issues – a positive duty would better enable systemic sexual harassment issues to be addressed, compared to the current individual complaints-based framework, Involvement of a specialist regulator – the proposal would mean a regulator with a focus on sexual harassment would enforce compliance with the positive duty, Shift the burden of enforcement from individuals – a positive duty would transfer the burden of upholding the legal framework from individuals who experience sexual harassment to employers, businesses and institutions, Alignment with the existing Work Health and Safety framework's focus on prevention – the proposal would align employers' obligations under the Sex Discrimination Act with their obligations under the Work Health and Safety framework, by focusing on preventative efforts

Please expand on your response:

Promoting a culture of prevention in the workplace is extremely important for individuals who may not have the capacity to advocate in their interest or raise complaints. This applies to many of our clients who come from disadvantaged backgrounds. A positive duty has the capacity to address systemic issues and shift the burden of enforcement from the individual (if the duty can be effectively enforced by a specialist regulator). This is because it requires duty holders to undertake comprehensive due diligence of the workplace and take tangible steps to improve the workplace and address the drivers of sexual and sex-based harassment and discrimination.

It can be more difficult for a person to raise a complaint about sexual harassment or sex-based harassment than someone who has identified a workplace hazard (e.g. a trip hazard). A positive duty in the Sex Discrimination Act would introduce a recognition that the experience is influenced by factors such as sex, gender and power imbalances (and therefore may be caused by gender inequity in the workplace). Similarly, a specialist regulator with enforcement powers in relation to the positive duty (as discussed in response to some of the later questions in this survey) will be able to address systemic issues of sexual and sex-based harassment or sex discrimination in an effective, trauma informed and victim centric way than under the Work Health and Safety framework.

As there is no human rights charter or harmonised anti-discrimination laws in the federal jurisdiction, the introduction of a positive duty into the Sex Discrimination Act is important to fill this gap to strengthen individual rights and promote equity. We hope to see similar changes in respect of other anti-discrimination legislation that shift the burden of addressing inequity from an individual focus to a broader framework in the future.

3 If you DO NOT support the introduction of a positive duty into the Sex Discrimination Act, what are your key reasons?

Please expand on your response:

4 What, if any, complexities would introducing a positive duty into the Sex Discrimination Act create for employers and/or people who experience sexual harassment?

Enter your response here:

We do not consider that introducing a positive duty into the Sex Discrimination Act would create an unreasonable burden on employers and other duty holders. A positive duty currently applies for employers in Victoria. There is no evidence to suggest that this has been burdensome on employers.

The Victorian Equal Opportunity and Human Rights Commission currently has guidelines in place for employers to assist with compliance (<https://www.humanrights.vic.gov.au/for-organisations/guidelines/#:~:text=Equal%20opportunity%20practice%20guidelines%20are,of%20the%20Equal%20Opport>

A similar set of guidelines at a federal level could assist employers and other duty holders with compliance. A positive duty is ultimately in the employer's benefit because compliance with the duty will assist them to reduce their exposure to liability for claims of sexual and sex-based harassment or discrimination.

For individuals, a positive duty can provide numerous benefits, as outlined in response to the previous questions in this survey. The complexity associated with bringing an anti-discrimination claim can be mitigated and potentially prevented by introducing a positive duty and thus shifting the burden of responsibility for enforcing compliance from the individual to the regulator.

For many individuals who are in insecure forms of work, it is important that the obligation extends to any person or entity in charge of a workplace rather than an obligation limited to an employer.

5 What are your views on the interaction between a new positive duty in the Sex Discrimination Act and the existing work health and safety duty? Can you identify any particular areas of interaction or concern that would require further thought or consideration, such as between different regulators when investigating issues of sexual harassment?

Enter your response here:

Overlapping jurisdictions and processes are very common in law, particularly in the field of employment law. For example, a worker who has experienced a workplace injury may have claim for workers' compensation as well as a claim in common law negligence. There are existing mechanisms to deal with any overlapping remedies; for example, a worker who has been compensated for lost wages through a claim for workers compensation will not be able to claim loss wages by way of damages in a claim in common law negligence.

The obligation of positive duty in the Victorian jurisdiction has not been shown to interact negatively with the existing work health and safety duty in the Victorian jurisdiction. A regulator working in the workplace health and safety sphere may not necessarily have the expertise to investigate a claim with nuances of sexual harassment or sex-based harassment. Therefore, a regulator with specific expertise is likely to be required to ensure that investigations are appropriately handled with a trauma informed approach. If there are any overlapping issues identified by each of the regulators, the information can be shared to facilitate a better work environment.

In addition, a positive duty extends beyond an investigation of issues that may overlap with breaches of workplace health and safety. A positive duty is an important step to ensure underlying causes of sex-based harassment (e.g. gender inequity) are addressed.

6 What other options to prevent sexual harassment in the workplace could the Government consider, alongside or instead of, introducing a positive duty into the Sex Discrimination Act?

Establishing industry codes of conduct/practice, which would set out specific standards for sexual harassment prevention and could be mandatory or voluntary to adopt (building on efforts already underway by some industries to respond to the findings of the Respect@Work Report and under recommendation 47

Please expand on your response:

Providing further education to employers and building capacity to create safe workplaces is unlikely to be effective in addressing sexual harassment and sex-based harassment. The fact that the harassment is "sex-based" is significant and should not be overlooked as a part of a broader health and safety framework. The focus should be to address the drivers or root causes of sexual and sex-based harassment, which includes gender inequity. A positive duty is a step towards addressing this gap in legal protection.

Similarly, increased compliance with the existing Work Health and Safety framework is unlikely to assist in addressing sexual harassment and sex-based harassment. Under the current Work Health and Safety regime significant penalties exist for non-complying employer; however, this has not had an impact on reducing sexual harassment and sex-based harassment.

We are also concerned that an accreditation scheme could be "tick-box" exercise for an employer without seeking to address the underlying causes of sexual harassment and sex-based harassment. An accreditation scheme may further pose a barrier for a complainant to bring a claim for sexual or sex-based harassment as the employer may seek to rely on the "tick-box" exercise in its defence, in contrast to the actual experience of the complainant. The accreditation scheme stands to benefit only employers who may be able to afford such schemes and promote their brands in that manner without addressing the underlying causes of sexual harassment and sex-based harassment.

In addition to a positive duty, establishing industry codes of conduct/practice may have a benefit depending on the industry. Some industries are prone to particularly hostile work environments where experiences of sex-based/sexual harassment and discrimination are common. For example, our client Olga (not her real name) referred to in the response to an earlier question worked in the construction industry in a workplace where she was the only woman. An industry code of practice may benefit employers and employees in these industries to identify and manage risks of sexual harassment and sex-based harassment. However, such a code of practice should be in addition to a positive duty to be enforced by a regulator. The function to be performed by a positive duty and a regulator enforcing that duty cannot be delegated to an industry that may already have entrenched issues of sexual harassment and sex-based harassment. They would lack the appropriate independence and the knowledge to perform such a function.

7 What are your views on how broadly or narrowly a positive duty should apply in terms of who it covers?

Other

Please expand on your response:

Apply to all employers and duty holders as broadly as possible within the working world, regardless of size, structure and revenue, with no exclusions and any person or entity in charge of a workplace regardless of size, structure and revenue, with no exclusions.

In our experience, some of the most egregious instances of sexual harassment and sex-based harassment occurs in small businesses with no dedicated HR staff.

8 What considerations should be relevant when determining whether a duty holder has adequately discharged a positive duty?

The nature and size of the business or operations, Business resources, The practicability and costs of the measure, Any systemic issues within that industry or workplace, Any other relevant facts or circumstances

Please expand on your response:

Resourcing (including the size of the business) can be a consideration as to whether the duty has been discharged, as this may be influenced by whether the organisation has a human resources function or expertise in workplace relations. However, the duty should apply as broadly as possible. It is important that every worker has the right to the protections afforded by a positive duty, even if the business is small and does not have dedicated HR staff. This can be accommodated by making the positive duty a proportionate response to the size and resources of the organisation (like in Victoria).

Some of the other relevant facts and circumstances when determining whether a duty holder has adequately discharged the duty may include: results of staff surveys; previous complaints; previous settlements; exit surveys/interviews; or any other information that could have put the employer on notice regarding a hostile work environment or the existence of sexual and sex-based harassment and discrimination.

Duty holders must have an obligation to consider any systemic issues associated with the workplace (e.g. a male dominated workforce, roles which involve working late at night or working alone), position or industry and take positive steps to address these systematic issues. Duty holders should not be expected to be alive to or address every single risk. However, as a minimum standard, the duty holders must have an obligation to take steps to address any known or anticipated/foreseeable risks.

9 What assistance or guidance would help support employers to meet any new positive duty obligations?

Enter your response here:

The Victorian Equal Opportunity and Human Rights Commission currently has guidelines in place for employers to assist with compliance. A similar set of guidelines at a federal level could assist employers with compliance.

The government should consider providing additional support to small businesses to assist with compliance (for example, a free advice service similar to the small business advice line service offered by the Fair Work Ombudsman or training targeted at small businesses). In addition, industry-specific guidelines should be created to assist with compliance in specific circumstances (for example: guidance relevant to office environments or guidance when a role involves travel or sleeping onsite).

Further, employers should be provided with a transition period during which they may address any outstanding issues to ensure compliance with the new positive duty.

Issue 3: Recommendation 18 – Enforcement powers for the Australian Human Rights Commission

1 If you SUPPORT the introduction of a positive duty, how should it be enforced?

Option 3 - New enforcement powers, as recommended in the Respect@Work Report

Please expand on your response:

It can be a traumatising experience for a victim of sexual harassment to make a complaint and navigate the legal system for reasons including re-telling their story multiple times, facing their harasser in mediation or court, and the general stress of litigation. In addition, WEStjustice's clients often face additional disadvantage and encounter barriers to making a complaint or accessing legal advice. They are often in insecure work, on temporary visas and come from non-English speaking backgrounds. It is difficult for these individuals enforce their legal rights and it can be a costly exercise. New enforcement powers as recommended in the Respect@Work report will ensure that the burden of enforcement is shifted from the individual to a regulator. A well-resourced regulator will be better placed to ensure compliance without victims of sexual harassment being required to carry the burden.

Many of our clients who experience sexual harassment in the workplace do not necessarily want monetary compensation. Often their main priority is having an opportunity to have their experiences validated and an empowering process to effect systemic change in their workplaces and prevent the same thing from happening to others.

In different contexts such as underpayment matters, many of our more vulnerable clients are not willing to pursue a wage claim, but request that we make an intelligence report to the Fair Work Ombudsman in the hope that they will take action to protect other workers. However, in cases of sexual harassment, it is not possible for victims to report concerns to a regulator who can investigate and enforce the law. As a result, employers and perpetrators can act with impunity and the abuse can continue.

Similar to the powers of the Fair Work Ombudsman, we also recommend that Australian Human Rights Commission is given the power to act on any complaints received by an individual and take appropriate enforcement action.

Finally, we note that a failure to comply with a compliance notice should further be accompanied by penalties.

2 If you SUPPORT the introduction of enforcement powers (option 3 above) for the Australian Human Rights Commission, what powers should be made available?

Enter your response here:

Compliance and co-regulatory powers would enable the Australian Human Rights Commission to work with an employer to facilitate compliance with the positive duty. It could include powers to request that employers develop an action plan for complying with the positive duty and register it with the Australian Human Rights Commission. It could also include monitoring and conducting assessments of the steps taken by employers to comply with the positive duty.

Investigation powers would enable the Australian Human Rights Commission to request and then compel information and documents, the ability to hold a hearing, examine witnesses and compel them to appear/give evidence. Penalties could also be available for non-compliance with these inquiry powers.

Enforcement powers would enable the Australian Human Rights Commission to issue compliance notices when required, accept enforceable undertakings from an employer and/or initiate proceedings to enforce enforceable undertakings or enforce non-compliance with a compliance notice in the court.

3 Should the Australian Human Rights Commission be able to exercise enforcement powers in relation to an alleged breach of the positive duty by any employer, regardless of size or number of employees?

Yes

Please expand on your response:

In our experience, clients who are the most vulnerable are rarely working for large businesses. Some of the more egregious conduct we have assisted with has taken place in small businesses. In some circumstances, employees in small businesses are in fact more vulnerable: there are no appropriate policies and procedures in place and there is unlikely to be any human resource support. We consider the workers in small businesses need to be afforded the same protections as those working in large businesses.

Businesses resources and the size of the business could be considered to be relevant factors to determine whether there has been compliance. Similarly, additional support can be provided to small businesses to assist with compliance.

Issue 4: Recommendation 19 – Inquiry powers for the Australian Human Rights Commission

1 What are your views on providing the Australian Human Rights Commission with new or additional inquiry powers to inquire into systemic unlawful discrimination, including sexual harassment?

Support providing the Australian Human Rights Commission with new or additional inquiry powers to inquire into systemic unlawful discrimination, including sexual harassment

Please expand on your response:

As mentioned above, it can be a traumatising experience for a victim of sexual harassment to make a complaint and navigate the legal system. WEStjustice's clients often have additional experiences of disadvantage. They are often in insecure work, on temporary visas and come from non-English speaking backgrounds. It is difficult for these individuals enforce their legal rights and it can be a costly exercise. Inquiry powers would assist to shift the burden of enforcement away from the individual to the regulator.

2 If you SUPPORT providing the Australian Human Rights Commission with new or additional inquiry functions, what are your key reasons?

Enter your response here:

Inquiry powers would assist to shift the burden of enforcement away from the individual to the regulator. The Australian Human Rights Commission may still continue to take a cooperative approach with employers to assist with their compliance. Other regulators, for example, WorkSafe in a Victorian context also engages in community education and cooperative approaches to addressing issues of non-compliance. A similar approach is taken by the Fair Work Ombudsman. Providing the Australian Human Rights Commission with inquiry powers will not compromise its ability to continue to take a cooperative approach where appropriate. History has demonstrated that the Australian Human Rights Commission is well equipped to work collaboratively/cooperatively with organisations.

While many employers may willingly cooperate with the Australian Human Rights Commission, there should be some recognition not every employer will do so. Accordingly, the Australian Human Rights Commission should be provided with the appropriate tools to ensure compliance from the non-cooperating employers. Employers that cooperate with the Australian Human Rights Commission will not be prejudiced as a result of these additional powers.

3 If you DO NOT SUPPORT providing the Australian Human Rights Commission with new or additional inquiry functions, what are your key reasons?

Enter your response here:

4 What are your views on limiting the Australian Human Rights Commission's proposed inquiry powers?

Enter your response here:

We do not consider the powers should be limited, in order to allow them to have a complete toolkit of regulatory action available to enforce compliance with the Sex Discrimination Act. Australian Human Rights Commission should be able to inquire into any systemic discrimination.

5 What are your views on accompanying any new or additional inquiry powers for the Australian Human Rights Commission with additional investigatory powers (such as the power to require the giving of information, the production of documents and the examination of witnesses)?

Support accompanying any new or additional inquiry powers for the Australian Human Rights Commission with additional investigatory powers

Please expand on your response:

Additional powers are necessary if an inquiry function is going to be successful.

6 Are any investigatory powers appropriate to accompany a broad inquiry power for the Australian Human Rights Commission?

Require the giving of information, Require the production of documents, Enable the examination of witnesses, Other

Please expand on your response:

Other: pursue penalties for non-compliance (similar to the role performed by other regulators e.g. Fair Work Ombudsman)

All of the above inquiry powers are necessary to assist the Australian Human Rights Commission to effectively perform its role as a regulator and shift the burden of responsibility from the individuals to the regulator. Currently, the Australian Securities Investigation Commission and Fair Work Ombudsman have broad inquiry powers that assist their role as regulators. The Australian Human Rights Commission should be given equivalent powers to address sexual harassment and sex-based harassment in the workplace.

Issue 5: Recommendation 23 – Representative actions

1 What are your views on amending the Australian Human Rights Commission Act to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters?

Support amending the Australian Human Rights Commission Act to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters

Please expand on your response:

As outlined above, it can be a traumatising experience for a victim of sexual harassment to make a complaint and navigate the legal system. This often prevents victim-survivors of sexual harassment from making a formal complaint. Westjustice's clients often have additional experiences of disadvantage. They are often in insecure work, on temporary visas and come from non-English speaking backgrounds. It is difficult for these individuals to enforce their legal rights and it can be a costly exercise. The support of representative bodies may alleviate some of these barriers. Similarly, a representative body will have the capacity to collectively represent a group of individuals who may not otherwise come forward with a complaint and will have an increased ability (compared to an individual) to influence systematic change.

2 If you SUPPORT this proposal, what are your key reasons?

The amendment may increase the potential for systemic issues to be pursued under the Sex Discrimination Act and more matters to be heard in the federal courts without placing the burden on individuals to bear the cost and responsibility for commencing proceedings. The amendment may encourage more individuals to pursue legal remedies by reducing the financial and other burdens (for example, re-traumatisation) associated with pursuing litigation. The amendment may strengthen the role of representative bodies in addressing discrimination in the workplace, including sexual harassment.

Please expand on your response:

Representative bodies, including unions, are often better able to navigate the legal system in comparison to individuals, particularly individuals who have undergone traumatising experiences of sexual harassment. If the representative bodies can commence representative action, victims of sexual and sex-based harassment will be better supported. Further, representative bodies will also be able to bring action in the interest of a group of individuals facing similar or identical systematic issues in the workplace. This will improve access to justice and reduce the burden placed on victims to pursue a remedy.

3 If you DO NOT support this proposal, what are your key reasons?

Please expand on your response:

4 Do you consider representative complaints and representative proceedings (class actions) to be an effective mechanism for people to address anti-discrimination matters, such as sexual harassment?

No

Please expand on your response:

Representative action under Part IVA of the Federal Court of Australia Act requires a minimum of 7 group members to commence a class action and the group members must have common issues that can be resolved as a group. Experiences of sexual harassment and sex-based harassment can often impact individuals in different ways. Further, it is unlikely that two or more individuals may have had an identical experience, even at the hands of the same perpetrator. In circumstances where there are many individual variables, it is highly unlikely that Part IVA of the Federal Court of Australia Act will offer an effective pathway for victims of sexual harassment sex-based harassment. Such claims (if they were able to overcome the procedural hurdles of commencing a class action) are likely to be subject to numerous interlocutory challenges that are likely to be costly and unaffordable for any victims.

5 What are the advantages of allowing representative bodies to commence representative proceedings on behalf of people who have experienced discrimination, including sexual harassment, given they are already able to provide financial, legal and other support to applicants under the existing framework?

Enter your response here:

Representative bodies will be able to commence proceedings as the named Applicant rather than the victim being named as the Applicant. For an individual who has undergone trauma of sexual harassment, this can be a significant relief. The representative body as the named Applicant will be able to pursue the matter on behalf of the victim and therefore assist the victim to maintain a level of distance from the perpetrator. This could be of significant assistance to a person who has undergone trauma of sexual harassment. Further, the representative body will be able to assist and support the victim throughout the process rather than through discreet financial, legal or other support.

6 Are there other benefits associated with allowing representative bodies to commence representative proceedings in the federal courts in anti-discrimination complaints? Is there any evidence to support these benefits?

Enter your response here:

Other benefits include taking the financial and the logistic burden away from the Applicant. There is precedent for cases run by representative bodies under the Fair Work Act.

7 What are your views on placing limits and restrictions on any amendments that would permit representative bodies to bring a representative proceeding on behalf of applicants in anti-discrimination matters to prevent potential misuse of such a mechanism? If you support limitations, what should these limits be?

Enter your response here:

Representative bodies should be encouraged to represent the interest of victims of sex-based harassment as far as practicable. In order to protect victims of sex-based harassment, it may be appropriate to impose some limited prohibitions on what a representative body may require from the individual in exchange for representing them in a proceeding. For example, if a representative body stands to recover their costs from any compensation awarded to the victim, it may be appropriate to impose a limit on the costs that can be recovered.

Issue 6: Recommendation 25 – Costs protections

1 What are your views on changing the current costs model?

Support changes to the current costs model

Please expand on your response:

The current cost model is a significant deterrent for commencing a claim in the federal jurisdiction. Our clients are often in insecure work, on temporary visas and come from non-English speaking backgrounds. They are not in a position to meet an adverse cost order if that situation eventuates. This in our experience is a significant deterrent for an individual to pursue a claim under the Sex Discrimination Act.

2 If you SUPPORT a change to the costs model, what are your key reasons?

The current costs model deters applicants from initiating civil proceedings, even if they have a strong claim, The current costs model favours parties with significant resources, such as large employers and businesses

Please expand on your response:

The current cost model requires a complainant to take a significant risk to pursue a remedy. For an individual that has experienced the trauma of sexual harassment, this is an added burden that results in unjust outcomes. In case of our clients, who also come from other positions of disadvantage, the cost risk creates a further barrier to access justice.

The current costs model also favours parties with significant resources. Litigation is a costly process and it invariably favours the parties with significant resources. Parties with significant resources can drive up the costs of litigation and impose cost pressures on the party with less resources to reach unfavourable settlement outcomes.

3 If you DO NOT support a change to the current costs model, what are your key reasons?

Please expand on your response:

4 Which of the following options, if any, is the most appropriate costs model to apply in anti discrimination matters?

Other

Please expand on your response:

WEstjustice supports a variation of the equal access model of costs.

We suggest section 570 of the Fair Work Act should be replicated in the Australian Human Rights Commission Act – each party bears their own costs unless one party has acted vexatiously or unreasonably except where the Applicant is ultimately successful in the proceedings, in which case the costs follow the event. This allows a Respondent to recover costs in exceptional circumstances where the Applicant's conduct is deemed unreasonable or vexatious and therefore would alleviate some concerns about any Respondents being unfairly targeted or opening floodgates for any unmeritorious claims. However, the Applicant if successful being able to recover costs at the conclusion of the proceedings is also a vital consideration from an access to justice point of view.

Replicating section 570 of the Fair Work Act in the Australian Human Rights Commission Act will eliminate one barrier faced by Applicants to pursue claims of sexual harassment as it will significantly reduce the risk of exposure to adverse costs. However, in most cases, the Applicants will still be required to cover the costs of their legal representation, which can still be a prohibitive expense for many victims of sexual harassment. Especially in cases where the claim may be against a well-resourced opponent, the cost of litigation can impose cost pressures on the victim and compel them to accept unfavourable settlement outcomes. An ability to recover costs following a successful outcome will alleviate some of these cost pressures and can act as a significant deterrent for offenders.