

30 June 2023

Committee Members
Parliamentary Joint Committee on Human Rights
c/o Committee Secretariat
PO Box 6100,
Parliament House
Canberra ACT 2600

By online lodgement only

Dear Committee Members

Inquiry into Australia's Human Rights Framework

Circle Green Community Legal (**Circle Green**) welcomes the opportunity to contribute to the Parliamentary Joint Committee on Human Rights on the inquiry into Australia's Human Rights Framework (**Inquiry**).

About Circle Green

Circle Green is a community legal centre in Western Australia providing state-wide specialist legal services in the areas of employment, tenancy, humanitarian, and family and domestic violence to the WA community. Within these specialist areas, Circle Green provides services including legal advice, casework, representation, duty lawyer services, outreach, community legal education, information, referrals, advocacy, and law reform. Our services are aimed at assisting people who face vulnerability or disadvantage in their access to justice. More information about Circle Green's services can be found on our website: <https://www.circlegreen.org.au/>.

Circle Green is the only community legal centre in WA which has a specialist workplace law practice assisting vulnerable and disadvantaged non-unionised WA workers. Our workplace law services include legal advice, casework, representation, and education on state and federal employment and workplace discrimination laws.

Submissions

Circle Green thanks the Committee for its work reviewing the Australia's Human Rights Framework (**Framework**), and the National Action Plan on Human Rights (**Plan**). The Framework and Plan together contain a range of important initiatives that if implemented could significantly improve safety and quality of life for many Australians. However, we also note that, as highlighted by the Australian Human Rights Commission (**AHRC**) in its submission to the Inquiry dated May 2023, many of the measures outlined in the Framework and Plan were not implemented and can therefore not be said to have been effective to date.¹

In this submission we highlight a number of issues that we have observed in the course of our work with vulnerable and disadvantaged Western Australians. Specifically, our observations highlight the

¹ Submission by the AHRC to the Inquiry dated May 2023, p4.

adequacy of existing mechanisms to protect human rights in the federal context and the challenges our clients experience engaging with the AHRC.

In summary, the issues are:

- (a) the complexity manifested by a broad range of separate but overlapping anti-discrimination legislation, which creates barriers to accessing justice, particularly for vulnerable members of the community and those experiencing intersectional discrimination and harassment;
- (b) the long wait times for the AHRC to process and address complaints, particularly for matters involving workplace sexual harassment and sex discrimination;
- (c) the limitation periods for making a complaint to the AHRC are too short, particularly for matters involving sexual harassment and sex discrimination; and
- (d) there are gaps in current anti-discrimination legislation, specifically a lack of protection from discrimination based on:
 - (i) criminal history;
 - (ii) job history; and
 - (iii) family status.

We address each issue in more detail below.

Complexity of federal anti-discrimination legislation

We note the Framework commits to a review of federal anti-discrimination legislation, with a focus on removing unnecessary regulatory overlap, addressing inconsistencies, and making the system more user-friendly.² Similarly, we note action 17 in the Action Plan is to develop legislation to consolidate Commonwealth anti-discrimination laws.³ Circle Green emphasises the acute need for this streamlining exercise, provided that the protections in the resulting legislation are no less comprehensive than those in the current patchwork of laws.

To highlight the extent of the legislative overlap in Western Australia, one or more of the following claims may be available to an employee in Western Australia who was dismissed from their employment without a fair process after experiencing discrimination in the workplace:

1. unfair dismissal claim under the *Fair Work Act 2009* (Cth) (**FW Act**);
2. general protections claim under the FW Act;
3. unlawful termination claim under the FW Act;
4. unfair dismissal under the *Industrial Relations Act 1979* (WA) (**IR Act**);

² Framework p11.

³ Action Plan p10.



5. discrimination complaint under the *Equal Opportunity Act 2010* (WA);
6. discrimination complaint under a federal anti-discrimination statute.

If the client has experienced sexual harassment in the workplace, then there are also additional options. Applications for orders to stop sexual harassment are available under both the FW Act and the IR Act, a sexual harassment claim can be made under the FW Act and the employer may also have breached the *Work Health and Safety Act 2020* (WA).⁴

A claimant may not make concurrent claims in multiple jurisdictions, and may only make certain claims concurrently in the same jurisdiction, so they must understand the exact claims available to them and the relative merits of each before proceeding. In Circle Green's experience this is very difficult to navigate without a lawyer, and Circle Green's clients by nature often do not have the personal resources necessary to seek private legal advice. This increases demand for the services of community legal centres like Circle Green.

We note that introducing a new federal Human Rights Act may serve to increase the complexity of the legal landscape and add a further layer of complexity for some disadvantaged Western Australians.

Delays in processing AHRC complaints

In March 2023 the AHRC notified Circle Green that it continues to face a large backlog of complaints, with wait times for allocation of complaints being around 9 to 12 months. The AHRC is encouraging parties to enter into direct discussions or negotiations to resolve the complaint during these delays.

In Circle Green's experience, this is not always appropriate. This is especially the case where an individual has already unsuccessfully approached their employer regarding a serious and traumatic matter such as workplace sexual harassment, and where the employer continues to fail to engage in any discussions to resolve the matter.

Case Study 1: Molly

Molly is a single mother of two children and is from a culturally and linguistically diverse background. Molly also previously experienced family and domestic violence (FDV) from her ex-partner. Molly was sexually harassed at work by two co-workers. They made sexual remarks about her that made her feel uncomfortable and intimidated, and on one occasion, one of her co-workers stripped down to his underwear in front of her. Molly complained about the conduct to her manager on numerous occasions, but nothing was done. Molly resigned from her employment after she was told

⁴ WHS Act s19(1), (3)(a).



she would have to continue working with the perpetrators of workplace sexual harassment.

The workplace sexual harassment compounded the psychological injury that Molly already suffered from her previous experience of FDV, and she had to seek extensive medical and psychological support.

Circle Green assisted Molly with writing a without prejudice letter to her former employer to resolve the matter. However, her former employer did not respond.

Circle Green filed an AHRC complaint on Molly's behalf in early December 2022, but the AHRC has not yet allocated her matter. Molly is still waiting for a resolution to her matter.

As a result of the significant delays in the AHRC, Circle Green has been referring clients to other forums to commence legal proceedings. The alternative forum for making a workplace sexual harassment or discrimination complaint is the Equal Opportunity Commission (**EOC**) in Western Australia. The EOC may not award compensation in excess of \$40,000 and a claim must be made to the EOC within 12 months of the conduct. For more serious instances of sexual harassment, clients may face the difficult choice of accepting a potentially lower compensation figure or facing significant delays for their matter to resolve. The shorter limitation period at the EOC also often means clients have no choice but to proceed to the AHRC.

Case Study 2: Yuki

Yuki is a young woman who was employed by a large, national system employer in the retail sector. Yuki was sexually assaulted by a co-worker both in the workplace car park and in her private home. Yuki reported the assaults to the WA Police and to her employer.

Yuki's employer assured her that it would look into the matter and that she would not have to work with the perpetrator. However, the employer continued to roster her at the same time as the perpetrator and required her to deal directly with him in her role. The employer then told Yuki that it wouldn't take any action as the assaults occurred outside of work.

Yuki resigned from her employment because she felt that her employer did not take her complaint seriously.

Circle Green assisted Yuki by providing her advice, drafting a letter to her former employer to resolve the matter, drafting a general protections claim (addressing the victimisation by the employer) and making complaints of sexual harassment. The employer has not engaged with Yuki throughout the process.

Yuki attempted to have her complaint determined in the EOC, even though she knew she was out of time, because she was very concerned about the processing times in the AHRC. Unfortunately, the EOC would not accept her

complaint and she lodged a complaint in the AHRC. Close to 2 years on from the sexual assault, Yuki is still waiting for a resolution to her matter.

Timeframes for making a complaint to the AHRC

Circle Green welcomed the extension of the timeframe for making sexual harassment complaints under the *Sex Discrimination Act 1984* (Cth) from 12 to 24 months. However, we consider that this limitation period should be extended further.

In our experience, it often takes people targeted by sexual harassment longer than 24 months to deal with the practical and psychological impacts of workplace sexual harassment, particularly if they come from a vulnerable or disadvantaged background. Circle Green has observed that a person targeted by sexual harassment is primarily concerned about their physical, mental, and economic safety and security after experiencing sexual harassment, rather than pursuing a legal claim. The psychological impacts of sexual harassment can also vary significantly between individuals, and those impacts can continue for extended periods of time.

In 2022 Circle Green convened a Lived Experience Advisory Panel (LEAP) comprising members of the public who have personal lived experience of sexual harassment. A recent quote from a LEAP member conveys the impacts that serious trauma can have on an individual's ability to consider pursuing legal action:

To grow yourself back post-trauma can take more than 12 months... then to be in a position to even speak about it? Even when I left that company, the VP of HR said to me "if this had happened more recently, he would have been fired". But he wasn't, and he still worked there. This 12 or 24-month period is not enough. You need longer, particularly for those whose experiences were prior to this cultural (#MeToo) movement, because only then do workers have the empowerment of feeling like maybe they deserved better.

Circle Green recommends that the AHRC's discretion to terminate a sexual harassment complaint on the grounds of time not arise until 6 years after the alleged sexual harassment occurred. This is consistent with the general limitation period that applies to many other civil law actions and is more appropriate considering the nature of psychological impacts of sexual harassment.

Gaps in current anti-discrimination legislation in relation to specific protections

Criminal history

The *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), defines discrimination to include any distinction, exclusion or preference made on the ground of an irrelevant criminal record.⁵ However criminal history (or a criminal record) is not a protected characteristic under federal anti-discrimination law. This means that the AHRC can accept complaints of discrimination in employment opportunities on the basis of criminal history, however it only has the power to inquire

⁵ *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) s3, *Australian Human Rights Commission Regulations 2019* (Cth) reg 6.



into and conciliate those complaints.⁶ Where conciliation is not appropriate or unsuccessful, and the AHRC finds that discrimination has occurred, it can prepare a report of the complaint, including recommendations for action, for the Attorney General.⁷ The AHRC can recommend compensation to be paid to the aggrieved party, however the recommendations are not enforceable.

In 2018 the AHRC reported on a complaint where it found the applicant to have been discriminated against on the basis of her criminal history.⁸ The applicant '*indicated her views that discrimination on the basis of criminal record should be actionable under federal anti-discrimination law or, if this is not possible, that all relevant state laws should be amended to specifically prohibit discrimination on the basis of criminal record in Australia*'.⁹

Circle Green recommends that discrimination on the basis of criminal history be made unlawful under federal anti-discrimination law.

Job history

Under Victoria's anti-discrimination law, employees and prospective employees are protected from discrimination based on their profession, trade or occupation.¹⁰ This specifically protects sex workers, who have long been subjected to discrimination in all aspects of life.¹¹ Federal anti-discrimination laws do not specifically address job history discrimination, or discrimination of sex workers specifically.

Whilst an argument could be made that discrimination on the basis of sex work could constitute sex discrimination due to the higher proportion of women in the sex work industry and the imputed characteristics about sex workers, the argument is a legally complex one. Given the widespread discrimination against sex workers and the lack of redress available, job history discrimination should be included in federal anti-discrimination law. This amendment would address the stigma and discrimination faced by sex workers in Australia, while also offering broader protections to those who may face discrimination on the basis of job history in other contexts.

Family status

Under the *Equal Opportunity Act 1984 (WA)* (**EO Act**) it is unlawful for an employer to discriminate against a person on the ground of their family status, such as being a relative of a particular person. Discrimination on the basis of family status is not unlawful under federal anti-discrimination laws.

Several clients have contacted Circle Green's Telephone Advice Service for advice about family status discrimination. By way of example, a client and their family member (e.g. sibling) may have the same employer. When the client's family member makes a workers compensation claim, the employer dismisses the client in retaliation to the family member's claim. In those circumstances, the client would be able to make a complaint to the EOC, as that conduct is unlawful under the EO Act. However, the client will not be able to make a complaint to the AHRC as that conduct is not unlawful under federal anti-discrimination laws. For reasons outlined above, making a claim in the

⁶ AHRC Act pt 2 div 4.

⁷ AHRC Human Rights Reports: <https://humanrights.gov.au/our-work/legal/projects/human-rights-reports>.

⁸ Report No. 125: *Ms Jessica Smith v Redflex Traffic Systems Pty Ltd* [2018] AusHRC 125.

⁹ *Ibid* [99].

¹⁰ *Equal Opportunity Act 2010* (Vic) s 6.

¹¹ Scarlet Alliance, Australian Sex Workers Association Briefing Paper: Anti-Discrimination and Vilification Protections for Sex Workers in Australia (February 2022).



EOC rather than the AHRC has some disadvantages, including a cap on compensation and a shorter limitation period. Circle Green recommends that family status discrimination be made unlawful under federal anti-discrimination law.

Conclusion

Thank you for considering Circle Green's contribution to the Inquiry. Please contact Imogen Tatam, Senior Lawyer Law Reform (Workplace) at imogen.tatam@circlegreen.org.au with any queries or for more information about anything in this submission.

Yours sincerely



Celia Dufall
Chief Executive Officer

