

14 April 2023

Australian Government  
Attorney- General's Department  
National Circuit  
BARTON ACT 2600

### **Review into an appropriate cost model for Commonwealth anti-discrimination laws**

The National Catholic Education Commission (NCEC) welcomes the opportunity to provide a submission to the review into an appropriate cost model for Commonwealth anti-discrimination laws.

NCEC is the representative body for Australia's Catholic schools. Working closely with state and territory Catholic Education Commissions, NCEC advocates at the national level on behalf of the Catholic sector and the hundreds of thousands of Australian families who entrust the education of their children to our schools.

Catholic schools are universal in reach, open to all families who seek a Catholic Education and are the nation's largest provider of education outside government. Australia's 1,759 mostly low-fee Catholic schools educate one in five, or nearly 794,000 students and employ more than 104,000 staff.

In addition to this submission, representatives of NCEC attended a Respect@Work Roundtable video conference consultation with officials from the Attorney-General's Department to discuss the scope and substance of the current inquiry.

#### **Catholic Education and the *Respect@Work* Report**

The inherent dignity of each individual irrespective of personal attributes, values or beliefs, and their inalienable right to freedom while supporting the common good, lies at the heart of Catholic social teaching. As such, the elimination of discrimination in any form is a matter of significant interest to Catholic education.

NCEC welcomes the Australian Government's commitment to implement the recommendations of the *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (the Report). The Report is a substantial and significant milestone in efforts to prevent and address sexual harassment in Australian workplaces.

The current review into an appropriate cost model for Commonwealth anti-discrimination laws is intended to inform the implementation of Recommendation 25<sup>1</sup> of the Report, which concerns a costs protection provision for discrimination matters that proceed to court. The Report's focus in Recommendation 25 was the risk of an adverse cost order acting as a deterrent to applicants bringing complaints under the Sex Discrimination Act in federal courts.

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<sup>1</sup> Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

Access to justice and fair treatment for all Australians is a fundamental principle of law. NCEC welcomes proposals to ensure legislative frameworks are fit-for-purpose and to ensure that financial deterrents, risks, or lack of certainty are not barriers to justice for either complainants or responders.

As the Consultation Paper makes clear, trivial, vexatious, or unmeritorious complaints are generally rare and are often dismissed before proceeding to court. However, while such complaints may be uncommon, vexatious, misconceived and claims lacking in substance can create an unfair burden on the respondent. This can be particularly burdensome for not-for-profit education providers, such as Catholic schools, which are often small and do not have the same resources as large, for-profit organisations to respond to such claims.

#### *Implementing Recommendation 25*

NCEC notes the intent of the Australian Government that the costs model implementing recommendation 25 to be introduced following the current review would be applicable more broadly to all complaints of discrimination under Commonwealth anti-discrimination law.

This would mean that the costs model would apply across all protected attributes and all areas of public life covered by those laws – not just employment-related discrimination complaints, and not just complaints made under the Sex Discrimination Act.

The breadth of intent to implement a cost model across all areas of Commonwealth anti-discrimination law clearly goes beyond Recommendation 25 of the Report.

### **Response to Consultation Paper**

#### *The status quo*

As highlighted above, as the peak body for Catholic education in Australia NCEC represents schools and other education providers across the nation. In this context NCEC notes the number and range of costs protection models relevant to discrimination matters which currently exist at federal as well as the state and territory level as set out on pages 17-20 of the Consultation Paper.

The nuances of each model means that Catholic schools may be operating under significantly different models, depending on where the school is located or under which jurisdictional legislative framework the proceedings are pursued.

The number and range of costs protection models relevant to discrimination matters which are currently in use across jurisdictions serve to highlight the lack of consensus regarding the most appropriate costs model.

The lack of consensus regarding options for reform is further illustrated by the differing models recommended by the Report to be consistent with section 570 of the *Fair Work Act 2009* (a 'hard costs neutrality' model) and in the Australian Human Rights Commission's *Free and Equal: A reform agenda for federal discrimination laws* of a 'soft costs neutrality' model.

### *Options for reform*

NCEC welcomes and supports the considerations used in the Consultation Paper to analyse the various options for reform of the status quo. These considerations are a solid basis on which to evaluate the merits of each of the proposed models.

However, as the Consultation Paper makes clear each of the four models analysed with these considerations in mind have distinct advantages and disadvantages, and there is no model that balances all of the considerations perfectly.

### **Conclusion**

The Consultation Paper outlines the evident lack of consensus for a costs protection provision in current practice across Australia. The Australian Government intends to implement a cost model across all areas of Commonwealth anti-discrimination law, and notes that none of the proposed cost models balance all of the considerations perfectly. On this basis, NCEC is not in a position to recommend a specific model.

NCEC suggests that any costs protection provision recommended by this inquiry and implemented by the Australian Government should aim at increasing access to justice, while also providing a flexible framework and sets an appropriate balance with which to address and respond to a broad range of circumstances.

Should you have any further questions in relation to this submission, please contact Joanna Mackie Acting Deputy Executive Director, NCEC at [joanna.mackie@ncec.catholic.edu.au](mailto:joanna.mackie@ncec.catholic.edu.au).