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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

**By email:** legcon.sen@aph.gov.au

Dear Committee Secretary

**Australian Human Rights Commission Amendment (Costs Protection) Bill 2023**

Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (**Bill**).

As a national organisation working to ensure equality for LGBTIQ+ people in Australia, we **welcome this Bill**. This Bill marks an important step towards removing costs barriers that prevent people who have experienced unlawful discrimination[1], including on the basis of their sexual orientation, gender identity or intersex status, from seeking justice.

## SUMMARY: WHY WE SUPPORT THIS BILL

The cost of seeking access to justice, as well as the risk of an adverse costs order, is a major barrier preventing people who have experienced discrimination from seeking justice.

In order to reduce these access barriers and still preserve the ability for complainants to obtain legal representation, complainants need to have certainty that they can both:

- recoup their costs if they win (so that they can engage a lawyer on a 'no win, no fee' basis); and

[1] In this submission, when we refer to 'discrimination' in shorthand, we include all provisions which make discrimination, sexual harassment, harassment, vilification and victimisation unlawful.

- be generally protected against paying the costs of the other side if they lose, given the disparities in financial resources, power and knowledge that are typical of discrimination complaints.

A modified equal access model, as adopted by this Bill, achieves these aims. This Bill also includes important safeguards which balance the interests of complainants and respondents where there is no financial or power imbalance between them, or where the complaint is vexatious or has been prosecuted unreasonably.

## CONSIDERATIONS THAT UNDERPIN THE NEED FOR AN EQUAL ACCESS MODEL

Discrimination complaints go to fundamental injustices and harms to dignity. For this reason, the usual costs recovery approach that may work well in commercial disputes, or disputes where monetary damages are likely to be higher or more readily calculable, is not appropriate in a discrimination context and discourages meritorious complaints from people who have been discriminated against. This issue is not new and has been raised multiple times in previous inquiries.[2]

### ISSUES WITH THE EXISTING COSTS MODEL

The existing costs model, whereby costs follow the event subject to the residual discretion of a court to award costs differently,[3] can undermine the effectiveness of discrimination protections because of imbalances in power, knowledge and financial resources between a typical complainant and a typical respondent.

A person seeking a remedy for discrimination faces a notoriously complex legal regime, most often against an opponent – such as an employer, educational institution, goods or services provider, or government agency – who typically has better access to the information and financial resources needed to understand and defend the claim. The existing model can easily result in an ordinary, uninsured person being required to pay hundreds of thousands of dollars in legal costs, even if they win, because a relatively modest offer of compromise (or *Calderbank* offer) made earlier in the process massively increased the risk of an adverse costs order.[4] Many complainants who have experienced the indignity of discrimination would simply rather not risk losing more in the pursuit of justice than they already have.

### ISSUES WITH ALTERNATIVE COSTS MODELS

An alternative costs model such as that in s 570 of the *Fair Work Act 2009* (Cth), whereby costs are generally borne as they fall (subject to narrow exceptions), can also undermine the effectiveness of discrimination protections because of imbalances between a typical complainant and a typical respondent.

Given that damages for successful discrimination complaints are likely to be lower than the cost of obtaining legal representation in the first place, most complainants cannot afford to pay

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[2] See for example the 1997 Senate Legal and Constitutional Affairs Committee Inquiry into the Human Rights Legislation Amendment Bill Report; 2008 Senate Inquiry into the Sex Discrimination Act; 2004 Productivity Commission Review of Disability Discrimination Act; , 2011-2012 Consultations on the Human Rights and Anti-Discrimination Bill; 2020 Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces AHRC Report; 2021 Free and Equal – An Australian Conversation on Human Rights AHRC Report; .

[3] See for example Federal Court Rules 2011 (Cth), rr 25.14 , 40.01, 40.02, 40.03 & 40.06; Federal Circuit Court Rules 2001 (Cth), rr 21.02, 21.03 & 21.04, 21.10, 21.16.

[4] See for example Federal Court Rules 2011 (Cth), r 25.14 and *Richardson v Oracle Corporation Australia Pty Limited* (No 2) [2013] FCA 359 [31].

lawyers knowing they are unlikely to recoup their costs, even if they win. This exacerbates the injustice of financial imbalances between typical complainants and typical respondents and undermines the ability of most complainants to obtain 'no win, no fee' legal representation because there is unlikely to be sufficient damages to pay what would be owed to lawyers.

This model is also unfair in that the cost of bringing a successful claim is really part of the damage which has been suffered by a successful complainant who would not have incurred any legal costs had the discriminatory conduct not occurred in the first place.

## A MODIFIED EQUAL ACCESS COSTS MODEL IS JUST AND EQUITABLE

There are several features of discrimination complaints that make an equal access model as proposed by this Bill the fairest and most appropriate costs model for federal discrimination complaints. Some of these features are unique to the federal discrimination framework, while others feature in other legal areas too. However, this unique combination of features leads Equality Australia to strongly support the costs model which is proposed by this Bill.

The features are:

- **Gateway restrictions.** The requirement to make a complaint to the Australian Human Rights Commission (**AHRC**) which must have been terminated by the President of the AHRC prior to commencing proceedings in the federal courts, and associated restrictions on who may commence proceedings, mean that complaints lacking in substance are less likely to be commenced in the federal courts.[5] This lessens the risk that a respondent will be required to defend an unworthy complaint.
- **Damages awarded have been historically low.** When unlawful discrimination cases have reached the courts, damages awarded have historically been low and, in any case, the amount a court will award is notoriously difficult to accurately predict.[6] Legal fees may exceed these damages, meaning that even successful complainants risk being left out of pocket if costs are awarded on an ordinary basis, or not awarded at all under a 'parties bear their own costs' model. Further, in this context, respondents may make very low or modest offers of compromise[7] (or *Calderbank* offers) to make a matter 'go away' that can significantly increase the risks of an adverse costs order being awarded against the complainant, even if the complainant ultimately *wins*.
- **Imbalances of power and financial resources are typical.** Obligation holders in most discrimination areas are employers, educational institutions, goods and services providers and government agencies.[8] On the other hand, those owed obligations are typically individual employees, students, customers and citizens who have historically experienced discrimination and disadvantage based on their race, sex, gender identity,

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[5] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1).

[6] Margaret Thornton, Kieran Pender and Madeleine Castles, *'Damages and costs in sexual harassment litigation: A doctrinal, qualitative and quantitative study'* (Australian National University, 2022), 21–27; Australian Human Rights Commission, 'Chapter 7 – Damages and Remedies' in *Federal Discrimination Law* (AHRC, 2023).

[7] See Federal Court Rules, r 25.14(1).

[8] For example, see *Sex Discrimination Act 1984* (Cth) s 14 (discrimination in employment), s 21 (discrimination in education), s 22 (discrimination in the provision of goods and services), s 26 (discrimination in the administration of law and programs). Employment, education and goods and services complaints comprise the vast majority of complaints received by the Australian Human Rights Commission: see Australian Human Rights Commission, Complaint Statistics 2022-23 (AHRC, 2023).

sexual orientation, intersex status, age or disability. The typical complainant and typical respondent are unequally matched in terms of their size, power, financial resources and sophistication.[9]Additionally, respondents in unlawful discrimination complaints are usually insured against public liability, either as an entity or by their employers if acting in the course of their employment, whereas individual complainants are typically reliant on their personal financial resources. By bringing proceedings, a typical complainant therefore bears a significant financial risk that is not felt equally by a typical respondent.

- **Knowledge is often in the power of the respondent.** The ultimate outcome in discrimination complaints often relies on information exclusively held by the respondent, who bears the burden of proof in respect of the 'reasonableness' requirement under the definition of indirect discrimination and any legal exception that they seek to rely upon (such as the defence of unjustifiable hardship).[10] Further, the real reason underlying any detrimental treatment (such as the refusal to get a promotion or a job) may also not be known by the complainant at the outset, in circumstances where the respondent is able to reveal evidence not previously known by the complainant. Because of this, the complainant often cannot reliably predict the strength of their case at the outset of litigation, which means, without adequate costs protection, proceeding to litigation presents a very high risk that cannot be mitigated by the complainant's own actions. Given discrimination complaints must generally be confidentially conciliated,[11] respondents who wish to avoid the costs and risk involved in litigation will be encouraged by an equal access costs model to put forward relevant information early so that the complainant is not caught by surprise. Or in other words, if you increase the costs risks of litigation on the respondent, you encourage them to resolve disputes earlier rather than rely on an assumption that most complainants will not be able to afford to pursue a complaint beyond conciliation.

- **Justice is driven by individual complaints.** The federal discrimination regime is unique among federal regulatory regimes for the burden it places on affected individuals to seek their own justice. Consumers have the ACCC. Financial service users have AFCA. People seeking to protect their personal information have the Australian Information Commissioner. Employees have the Fair Work Ombudsman. Each of these agencies have a range of regulatory powers, including enforcement powers. By contrast, people who experience discrimination must bring their own complaints and prosecute their own claims before federal courts. Until the new (and albeit limited) AHRC functions related to the positive duty on sex-based discrimination and systemic discrimination,[12] no regulator has been able to exercise any binding compliance functions in respect of discrimination, leaving people who experience discrimination bearing the entire cost and effort involved in seeking justice. The current enforcement powers in the anti-discrimination framework remain among the weakest of any Commonwealth regulatory regime. Further, as we submitted in respect of the Respect@Work Bill, the representative complaints regime is

[9] See Australian Government Attorney General's Department (2023) '*Discussion paper: review into an appropriate cost model for Commonwealth anti-discrimination laws*', Review into an appropriate costs model for Commonwealth anti-discrimination laws, pages 14-16.

[10] For example, see *Sex Discrimination Act 1984* (Cth) ss 7B and 7C.

[11] *Australian Human Rights Commission Act 1986* (Cth) ss 46PJ-46PKA.

[12] *Sex Discrimination Act 1984* (Cth) s 47C; *Australian Human Rights Commission Act 1986* (Cth) Part II, Div 4A and 4B.

entirely deficient.[13] This means that, while we continue to expect individual complainants to the work in enforcing our discrimination laws for the greater public benefit of developing jurisprudence and enforcing standards, providing some costs protection to the individuals who do recognises the public interest element involved in their advocacy and compliance actions.

Finally, we accept that not all complainants and respondents will have imbalances of power or financial resources. While the features described above are typical of discrimination complaints, there will be circumstances where it is appropriate for a different costs award to apply. Section 46PSA(6) of the Bill includes safeguards that allow a court to award costs where:

- the complainant has acted vexatiously or without reasonable cause;
- the complainant's unreasonable act or omission caused the other party to incur the costs; or
- the respondent was successful in the proceedings and does not have a significant power advantage over the complainant or significant financial or other resources relative to the complainant.

These safeguards reinforce our view that the modified equal access costs model proposed by this Bill, which builds upon the costs regime in section s 1317AH of the *Corporations Act 2001* (Cth), is the fairest and most appropriate costs regime for federal discrimination complaints.

Finally, something should be said about the costs regime in general. Whether someone takes forward a discrimination complaint and how that complaint is defended is not entirely a matter of which costs regime applies. The risk of an adverse costs order is part of that consideration, but so are the merits of the matter and the time, effort, delay and actual costs (not all of which can be recouped through a costs order) which will be incurred for the complainant and respondent alike. These are among the reasons why many people do not bring complaints, and why many complaints can be resolved by way of compromise rather than judicial determination. This reform does not touch on any of these other aspects. Accordingly, we agree with the Australian Human Rights Commission submission that a review of this costs regime within three years is warranted to ensure it has had its intended effect,[14] but we do not share the Australian Human Rights Commission's concerns that the costs regime alone will have as significant an effect on either the number of complaints or those that ultimately go forward to determination by a court. We also think that having more cases go forward to judicial determination would pay dividends for future complainants and respondents alike, as we get more clarity on the law in this area which is still underdeveloped and generally underutilised.

Finally, courts can manage their caseloads in many ways other than through the threat of costs orders, including by way of determining applications for summary judgment, summary dismissal, referrals to meditation, the determination of separate questions, and mechanisms that limit the scope and issues of dispute. These traditional measures are untouched by these reforms. The only thing that will change is that a genuine and reasonable complainant who believes they have suffered discrimination will not be punished further by potentially having to pay thousands or

[13] See our submission on the Respect@Work Bill here.

[14] Australian Human Rights Commission (2023) Australian Human Rights Commission Amendment Costs Protection Bill 2023 submission, 19 December.

even hundreds of thousands in the other side's costs if they wrong about this in law and lose. A larger and more powerful opponent, knowing that their costs may not be recouped if they win, might therefore consider the extent to which they incur those costs or deal with the complainant in an overly legalistic, obstructionist or harsh manner.

## FURTHER REFORMS

The Bill is an important step towards improving access to justice for discrimination complainants. However, it is one piece in a series of broader reforms that are urgently needed to ensure Australia's anti-discrimination framework is accessible, consistent and coherent as a whole. To this end, we reiterate our previous recommendations for reforms to Australia's anti-discrimination laws, as contained in our extensive submission to the Joint Parliamentary Committee on Human Rights Inquiry. You can read our full submission here.

We would be happy to provide the Committee with further assistance, including by testifying if required.

Kind Regards,

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