

Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

5 February 2024

By email

Dear Senator Green and Members of the Senate Legal and Constitutional Affairs Committee,

**PUBLIC HEARING: AUSTRALIAN HUMAN RIGHTS COMMISSION
AMENDMENT (COSTS PROTECTION) BILL 2023**

The Australian Lawyers Alliance is grateful to have been invited to appear before the Senate Legal and Constitutional Affairs Committee ('Committee') at the public hearing on Wednesday, 31 January 2024 in Canberra.

I was honoured to attend that public hearing on behalf of the ALA, in my capacity as ALA National President, and to speak in support of the modified equal access cost model proposed in the Human Rights Commission Amendment (Costs Protection) Bill 2023 ('Bill').

During the public hearing,¹ Senator Paul Scarr asked the ALA and the Australian Discrimination Law Experts Group to send the Committee at a later date our analysis of the Law Council of Australia's proposed alternative "broad discretion" model. This letter seeks to provide the ALA's analysis on the "broad discretion" model.

ALA members consider that the "broad discretion" model will do nothing more than continue the status quo – a status quo which is failing victim survivors of discrimination and harassment at work; a status quo where victim survivors are deterred from making meritorious claims concerning discrimination due to the fear of being bankrupted by legal costs; and a status quo where applicants who have commenced claims – in an area of law that is highly technical – are often doing so without legal representation due to a fear of legal costs, which puts those applicants at a distinct disadvantage against respondents who can fund their own legal representation.

The "broad discretion" model will also not progress the *Respect@Work* recommendations, nor will it satisfy the Australian public's expectation that the justice system should offer a victim survivor

¹ Commonwealth, *Hansard – Public Hearing: Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth)*, Senate Legal and Constitutional Affairs Legislation Committee (13 January 2024) 14.

access to bring a claim and to seek justice. This alternative model will not improve access to justice for victim survivors.

Further, the ALA submits that the “broad discretion” model will not address the power and resource imbalances which currently prevent victim survivors seeking justice in the federal jurisdiction. Presently, respondents (including small businesses) can insure themselves fully against this type of litigation,² and can claim these kinds of legal expenses as tax deductions. Victim survivors of discrimination do not have those options, *and* on top of that face barriers to accessing justice and deterrents to pursuing their legal rights, including bearing the costs of litigation. These imbalances in power and resources are understandably confronting to victim survivors.

The ALA expects that the “broad discretion” model would add an extra process whereby another application regarding costs would be made at the end of a trial, with the Court required to take many considerations into account, which will all add to the total costs of a proceeding.

The ALA reiterates our support for the Bill’s modified equal access cost model, as outlined in our written submission to this Committee (dated 22 December 2023).³

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We thank all Committee members for their time on this inquiry. Please do let me know if I can be of further assistance, in which case please direct correspondence to Elenore Levi, Policy and Advocacy Officer, Australian Lawyers Alliance

Yours sincerely,

Shaun Marcus
National President,
Australian Lawyers Alliance

² See: Berkley Insurance Australia, *Employment Practice Liability under Management Liability Cover* (Web Page, 2023) <<https://berkleyinaus.com.au/employment-practice-liability-under-management-liability-cover/>>.

³ Australian Lawyers Alliance, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Human Rights Commission Amendment (Costs Protection) Bill 2023* (22 December 2023) <www.lawyersalliance.com.au/documents/item/2614>.