National Legal Aid

The Senate
Legal and Constitutional Affairs Legislation Committee
c/ Ms Sophie Dunstone, Committee Secretary: LegCon.Sen@aph.gov.au

6 February 2024

Dear Committee

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

Thank you for the opportunity to make a submission about the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (**Bill**), and to appear before the Committee on 31 January 2024 to give evidence about the Bill on behalf of National Legal Aid.

This letter responds to a question on notice received that referred to paragraphs 87 and 88 of the Law Council of Australia's submission, which states:

> *It should also be noted that the equal-access model would operate on a significantly wider basis than comparable models overseas…*
>
> *In summary, there appears to be no precedent for an asymmetrical costs regime such as equal access applying to every discrimination claim in a given jurisdiction, including where respondents may be individuals.*

The question on notice asked us to address the discrepancy between the discussion of international examples of equal access costs models at pages 10-11 of National Legal Aid's submission and paragraphs 87 and 88 of the Law Council of Australia's submission, and whether the equal access costs model that is being proposed in this Bill is comparable to what applies in other jurisdictions.

Our response focuses on comparable costs models in the US, as we did not consider comparable UK or Canadian costs models in our submission.

National Legal Aid's response

We cannot agree with the LCA's statement at paragraph 87 of its submission that "the equal-access model would operate on a significantly wider basis than comparable models overseas."

The LCA states that "[t]he so-called 'American rule' applicable in most US discrimination litigation produces a 'no-costs' regime, rather than an equal-access one."[1] The 'American rule' is a phrase that is used in the2005 article by David Root that the LCA references in support of this statement.[2] Root states "the

[1] Law Council of Australia submission, paragraph 87.
[2] David Root, '*Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule*"', (2005) 15(3) Indiana International and Comparative Law Review 583.

'American rule', which has stood for over 200 years, is one in which each party must bear its own costs for litigation, regardless of the outcome."[3] The US costs model discussed in our submission, and which is comparable to the equal access costs model proposed in the Bill, applies under employment-related discrimination and sexual harassment laws federally and in California (among other states), and is commonly known as "attorney fee-shifting". Root expressly discusses this exception to the usual approach to costs – the 'American rule' – in his article under the heading *Fee-Shifting Statutes*:[4]

> *Perhaps the most meaningful exception to the "American rule" can be found in statutory shifting of attorneys fees, whereas there are more than 200 federal and close to 2,000 state statutes allowing the shifting of fees. Fee-shifting statutes can be divided into four main categories: 1) civil rights suits; 2) consumer protection suits; 3) employment suits; and 4) environmental protection suits. Congress has allowed these categories of statutes because they compel a higher public purpose, and therefore, successful lobbying litigants should not shoulder the cost of advancing American public policy, particularly when their victory does not result in a monetary award. Although there are a minority of statutes allowing a two-way shift (essentially the "loser pays" rule in which the losing party, whether plaintiff or defendant, must pay opponent's legal fees), most legislation employs a one-way shift whereby only a successful plaintiff can recover attorneys fees via statute.* [Footnotes omitted].

This passage, and Root's article generally, supports our analysis of relevant costs models in the US.

We reiterate our discussion of relevant US laws at pages 10-11 of our submission. Our research and summary of the relevant laws and key cases is consistent with the discussion of relevant US federal laws in the Australian Discrimination Law Expert Group's submission[5], as well as the Attorney-General Department's *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws.*[6]

At the time of writing our initial submission in April 2023 we contacted US legal expert, William Tamayo, and confirmed our understanding of the federal US laws discussed in our submission and their comparability to the equal access costs model in the Bill.[7] Mr Tamayo was the Regional Attorney for the US Equal Employment Opportunity Commission (EEOC) in San Francisco from 1995-2015, responsible for directing litigation and the overall legal program. From 2015-2021, Mr Tamayo was the EEOC District Director overseeing investigations, operations and administration.

It is true that, as in Australia, in the US there are multiple state and federal laws that prohibit discriminatory behaviour, there are differences between these laws, and they do not always cover the field of discriminatory conduct. However, it is not correct to suggest that there is no comparable precedent to the equal access costs model in the Bill, including where respondents may be individuals.

For example, as stated at footnote 32 of Annexure 1 of our submission, the equal access costs model has applied to workplace discrimination and harassment cases under California's *Fair Employment and*

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[3] Ibid, 585.
[4] Ibid, 588.
[5] Australian Discrimination Law Expert Group's submission, Appendix 1, 6-8.
[6] Australian Government Attorney-General's Department, *Consultation paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws (ag.gov.au)* (February 2023), 21.
[7] We note that if there any errors, they are our own.

Housing Act, Government Code s12940 (**FEHA**) since 2015.[8] That is, a successful defendant may only seek costs where the applicant's claim was frivolous, unreasonable or groundless, notwithstanding any offers of compromise.[9] The case of *Lopez v Routt* (2017) 17 Cal.App.5th 1006 confirmed that the equal access costs model applies to individual defendants as well as employer defendants.[10]

We reiterate our position that the Bill should similarly be amended to clarify that the mere refusal of a settlement offer is not intended to amount to an unreasonable act or omission for the purpose of the exceptions. This is important in a human rights jurisdiction where the litigation goals will often include restoring dignity and respect and achieving systemic change.

As in the comparable US models, exceptions to allow costs awards to be made against applicants with frivolous claims are built into the Bill. However, as we have outlined in our previous submission, our practice experience shows that litigation involves enormous personal cost and risk for complainants in discrimination cases and can contribute to further distress. The social, emotional and financial costs of litigation create a strong incentive for applicants to accept reasonable offers of settlement.

We consider that a comparable costs model to the one proposed in the Bill is well-established in discrimination and civil rights laws in the US and is similarly underpinned by policy considerations recognising the higher public purpose of discrimination complaints.

Should you require any further information from us please be in touch with the NLA Secretariat on 03 6236 3813 or nla@legalaid.tas.gov.au

Yours sincerely,

Louise Glanville
Chair, National Legal Aid
CEO, Victoria Legal Aid

[8] See *Williams v Chino Valley Independent Fire District* (2015) 61 Cal.4th 97.
[9] California *Fair Employment and Housing Act*, Government Code 12965(c)(6).
[10] For further discussion, see Kelly A Knight, 'Attorney's Fees And Costs In FEHA Cases', *Advocate* (2019), accessed at https://www.advocatemagazine.com/article/2019-august/attorney-s-fees-and-costs-in-feha-cases on 5 February 2024.