HRLA
HUMAN RIGHTS • LAW ALLIANCE

19 December 2023

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

Dear Committee Secretary,

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

I refer to the invitation by the Senate Legal and Constitutional Affairs Committee for submissions to the above proposal. HRLA welcomes the opportunity to provide this submission.

HRLA is Australia's only religious freedom law firm specialising exclusively in the areas of religious liberty and freedom of thought, speech and conscience. We regularly represent clients and litigate religious freedom matters in all States and Territories under Anti-Discrimination and Equal Opportunity Acts.

I enclose HRLA's submission with this letter. We are happy to appear for any oral hearing to speak to our submission.

Yours sincerely,

John Steenhof
Principal Lawyer

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Human Rights Law Alliance Submission concerning the *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023*

1. HRLA's core work involves acting for clients who defend or pursue discrimination law and related claims. We have considered the Bill in that context, and from our experience. HRLA cannot support the Bill, and recommends it be shelved.

2. The Bill removes the court's discretion to award costs in a way that is most fitting in the circumstances. It is antithetical to the interests of justice. It encourages discrimination proceedings to be brought when they never should be, including by actions motivated by prejudice and intolerance. The Bill would introduce unacceptable inequality between those making discrimination claims and those defending them.

3. The Bill would encourage unmeritorious claims to be brought. Even in those cases which are not unmeritorious, but where serious public interest and other legitimate issues are in contention, the effect of the Bill would be to compromise the proper defence of claims, by establishing an environment in which the financial risks from adverse costs awards are excessive from the outset.

4. HRLA does not object to s.570 of the *Fair Work Act 2009* (Cth) as a costs model in its context. We note that the Bill claims to be consistent with that provision. We disagree. The Bill is so far-reaching in its terms and its impact that it has no meaningful connection with s.570. The Bill directs costs outcomes which produce injustice from the outset of proceedings.

    4.1. S.570 is only concerned with costs payable by the party which instituted proceedings. The Bill does a disservice to the principle underlying s.570, which is to require the party initiating proceedings to bear the other party's costs in appropriate circumstances, namely when a court is satisfied that it instituted the proceedings vexatiously or without reasonable cause, or it acted unreasonably in causing the other party to incur costs. The Bill altogether prevents costs being awarded against the party instituting proceedings if those proceedings are taken against someone with a significant power advantage, or with significant financial or other resources, relative to such party. It deprives any religious entity, such as a school or church, of being awarded costs, except against an exceptionally well-heeled individual, when justice demands that costs should be payable by the party initiating the proceedings, because of their misuse of the process.

    4.2. The Bill ventures outside the remit of s.570, because s.570 makes no stipulation about costs payable by those against whom discrimination claims are made. The Bill requires the costs to be recovered from them if the party instituting proceedings succeeds on any one ground, even if on many other grounds it fails, and even if it instituted the proceedings vexatiously or without reasonable cause on those numerous other grounds. The court no longer has discretion to award costs differently in such circumstances, in order to achieve a just outcome. The court's discretion has been removed.

5. Among the most politically contentious issues of the day are the religious balancing clauses under the *Sex Discrimination Act 1984* (Cth). The outcome of the ALRC Inquiry into religious educational balancing clauses is unresolved. The Government's position appears to be clearly in favour of reducing or eliminating those exemptions from the SDA.

6. Christian schools and their religious ethos have long been the target of media condemnation and strategic litigation attacks by hostile secularist opponents. If the SDA balancing clauses for Christian schools are removed, it will expose Christian Schools to activist-driven litigation designed to attack the religious ethos promulgated in those Schools. This Bill will further imperil Christian schools by making them liable for the costs of any strategic discrimination lawfare that is partially successful. Schools will not be able to pursue claimants in costs for vexatious or worthless claims that are made that seek to weaponise discrimination laws. The Bill will be detrimental to Christian schools and will further erode the fundamental rights of parents to ensure the religious and moral education of their children in conformity with their own convictions.

7. Specific proposals of the Government for a religious discrimination bill have not yet been announced but many faith communities throughout Australia are not expecting the Government's position to be generous.

8. The effect of this Bill would be to compound any disadvantage that already exists in the lack of protection in Australian law for faith communities to hold and practise their beliefs freely, and to be free from discrimination on grounds of religion. The Bill would create an environment which will encourage them to become the target of greater hostile activism, including in merely ideology conflict, when they legitimately exercise their fundamental human rights. This is wrong in principle.

9. The Bill would impose a massive, unacceptable burden on those defending proceedings, to pay the costs of those who brought proceedings against them, and relatively little risk for the party initiating proceedings. Its practical effect would be to deprive litigants of their right to defend themselves in proceedings to which the Bill applies. The Bill is itself discriminatory in its effect.

10. We are grateful for the opportunity to make this submission and welcome any opportunity to appear in support of it.

Yours sincerely,

John Steenhof
Principal Lawyer