SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

Australian Human Rights Commission

Senator Paul Scarr asked the following question on 31 January 2024:

Senator SCARR: President—and Dr Cody might have some views on this—paragraph 17 of the Human Rights Commission's submission is with respect to the grounds of termination of a complaint. I'm not intimately familiar with how all that works in practice, so I really wanted to take some time to allow you to draw out how that step might become far more significant if the proposed bill is passed in its current form. For the Hansard record, I note it says: In addition, under this model, the Commission's grounds of termination of a complaint may operate as the final barrier to a respondent's costs exposure and the amendments may have the unintended consequence of significantly increasing the administrative burden on the Commission in having to consider and respond to detailed and lengthy submissions from respondents and their legal representatives advocating for termination of a complaint on grounds which would require the complainant to seek the leave of the court before being able to proceed with an application to the court. It seems to me that the submission is that that step is likely to gain some further significance and be more time consuming in the event that this bill is passed in its current form. I'm wondering if you could just walk us through a practical example of how that would work and why the Human Rights Commission has the concern that that may be an unintended consequence.

Prof. Croucher: I'll make a couple of observations and then, with respect, call upon Ms De Abreu to comment. This speaks to some of the amendments in 2017 which clarified that the leave of the court would be needed in certain contexts, but that there are other grounds where leave is not required and, therefore, a person who seeks to bring the proceedings in the court does not need to seek leave. They have a direct route, as it were, without that threshold. The administrative burden, as articulated in that paragraph and as conveyed to us, is that the attention then goes on whether or not the termination is on the basis of a leave-seeking ground. The focus then is whether the person can go straight to the court or needs to seek leave. That threshold of winnowing and the arguments about whether the termination notice addresses that issue is where the administrative burden lies. Ms De Abreu, could you add to that, please.

Ms De Abreu: Absolutely. That contest is what has informed this part of our submission. The—

Senator SCARR: Sorry to interrupt. Could you give me a practical example, or even take it on notice, so I can follow the timeline of what we're talking about and where you think the pinch point will potentially be? Is that possible?

Ms De Abreu: We can take on notice providing a practical example, but I think the crux of it is, essentially, that there are only two grounds on which a party can commence proceedings in court without seeking leave first. That is, first, where the issue involves a matter of public importance that should be considered by the courts and, second, where there's no reasonable prospect of the matter being settled by conciliation. The administrative burden has come in where respondents—at the moment, under the current model—are already advocating to the commission for the grounds to be terminated in a way that would require the applicant to seek the leave of the court and not on the two grounds that I've just read out. We raise this because one of the concerns that was raised was that, under the current model, respondents may view that point in time as their last barrier towards a potentially large cost exposure and having to bear their own costs in the Federal Court. That's why we say there's a potential risk that the administrative burden may increase; we may have more of those sorts of submissions being made at that point.

The response to the honourable senator's question is as follows:

Prior to amendments to the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) in 2017, where the President of the Australian Human Rights Commission (**Commission**) terminated a complaint, the complainant had an automatic right upon being issued with a termination notice to make an application to the Federal Court of Australia or what is now the Federal Circuit and Family Court of Australia (**federal courts**) for the court to hear and determine the matter.

The 2017 amendments to the AHRC Act had the effect of requiring a complainant to obtain the leave of the court before being able to make an application to the federal courts, unless the complaint is terminated on one of the following grounds:

- the subject matter of the complaint involves an issue of public importance that should be considered by the courts (s 46PH(1)(h)); or
- there is no reasonable prospect of the matter being settled by conciliation (s 46PH(1B)(b)).

As a result of the change in the effect of certain termination grounds, the Commission experienced an increased administrative burden in considering and responding to lengthy submissions from respondents and their legal representatives concerning the grounds on which a complaint should be terminated.

Paragraph 17 of the Commission's submission to this inquiry raises concerns that a potential unintended consequence of the Bill is a further increase in that administrative burden on the Commission. This is because the shift in the burden of costs liability to respondents in the Bill means that respondents may perceive the ground on which the President terminates a complaint as the last barrier to being exposed to the proposed costs regime in the federal court, and have a further incentive to put detailed arguments to the Commission about which termination ground is appropriate.

By way of example, where a complaint has proceeded through the Commission's complaints process and was unable to be resolved, if the complaint is terminated by the President on the ground in s 46PH(1B)(b) of the AHRC Act – that there is no reasonable prospect of the matter being settled by conciliation – upon receipt of the termination notice, the complainant

is able to immediately commence proceedings in the federal courts where the proposed costs regime would apply. However, if the President terminated the complaint on a non-leave seeking ground, such as where the President is satisfied that the complaint is lacking in substance under s 46PH(1B)(a) of the AHRC Act or the alleged discrimination is not unlawful discrimination under s 46PH(1)(a) of the AHRC Act, the complainant would be required to take the additional step of seeking the leave of the court to commence a proceeding before the respondent would be subject to the new costs regime.

The proposed costs regime may cause respondents to increasingly advocate to the Commission for a complaint to be terminated on particular grounds that would require the complainant to seek the leave of the court before it could commence proceedings in the federal courts. The anticipated additional administrative burden relates to the requirement on the Commission to consider and make a decision about what may be more numerous and detailed submissions on these issues. The Commission's recommendation 3 would allow for consideration of these matters in a review of the operation of the proposed amendments.

Senator Paul Scarr asked the following question on 31 January 2024:

Senator SCARR: This is my last question, and I'll also ask a question on notice. I'd be interested to know your views on paragraphs 93 to 105 of the Law Council of Australia's submission with respect to a broad discretion approach. Please advise the committee on notice how that would fit in with the recommendation in the Respect@Work and the Free and equal reports.

The response to the honourable senator's question is as follows:

In its submission to the inquiry of the Senate Legal and Constitutional Affairs Legislation Committee into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth), the Law Council of Australia proposed an alternative costs model that it refers to as the 'broad-discretion' costs model.

Under the proposed model, the default position would be that costs follow the event, however the court would be required to have regard to certain relevant considerations and hear the parties in relation to costs to determine whether it would be fair to make a different costs order.

While this approach would allow the court to make costs orders in the interests of justice having regard to mandatory relevant considerations, similar to the model proposed in the Commission's 'Free and Equal: A reform agenda for federal discrimination law — Position Paper' (**Free and Equal position paper**), in the Commission's view, the 'broad--discretion' costs model does not shift the approach to costs significantly from the current regime. By retaining the default position that costs follow the event, this model does not address the well-established concerns with the existing approach to costs identified in the Commission's 'Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report' and its Free and Equal position paper, including the serious disincentive of an applicant's exposure to the risk of a significant adverse costs order and the burden that applicants currently carry.