ACL Submission re public consultation on the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

SUBMISSION:

Re Public consultation on the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

Australian Christian Lobby's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

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

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CostsProtection23

19 December 2023

Dear Secretary

On behalf of the Australian Christian Lobby (**ACL**), I welcome the opportunity to make a submission to the Legal and Constitutional Affairs Committee in relation to its public consultation on the *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* (**Bill**).

In short, our submission strongly recommends that the Government withdraws the Bill.

The ACL would be very willing to meet with the Committee, or appear at any hearing, to discuss these submissions.

Yours Sincerely,

Christopher Brohier
Director, Public Policy

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EXECUTIVE SUMMARY

The ACL's submission discusses the following:

1. **The rationale for the Bill is not as claimed. It is radically different.**
2. **The impact of the Bill is asymmetrical, disproportionate and without justification.**
3. **The Bill would weaponise discrimination law and divide Australian society**
4. **The Bill departs from established principles concerning costs awards.**

Our conclusion is that the Bill is wrong in principle because of the human rights implications, because it is divisive of Australian society, and is inimical to the interests of justice.

Recommendations:

The ACL strongly recommends that the Government withdraws the Bill.

Our submissions are discussed in more detail below. All **bold** emphasis in quoted extracts is ours.

SUBMISSIONS

1. The Bill is radically different from its asserted rationale.

The Government claims the rationale for the Bill is the *Respect @ Work Report: Sexual Harassment National Enquiry Report (2020)*. The Explanatory Memorandum purports to "achieve the objectives of recommendation 25 of the Respect @ Work Report",[1] and "address the concerns raised by the Respect @ Work Report by protecting applicants from an award of costs against them in unlawful discrimination proceedings except in certain circumstances."[2]

Yet Recommendations 24 and 25 do not correspond with the Bill. They read as follows:

> Damages and costs
>
> Recommendation 24: The Australian Government conduct further research on damages in sexual harassment matters and whether this reflects contemporary understandings of the nature, drivers, harms and impacts of sexual harassment. This research should inform judicial education and training.
>
> Recommendation 25: Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

Section 570 of the *Fair Work Act 2009* (Cth) similarly does not provide the support which is claimed for the Bill. It is confined and applies a fundamentally different costs model to the one proposed in the Bill. Section 570 only contemplates costs orders when proceedings are instituted vexatiously, in the following very limited and specific terms:

> **Costs only if proceedings instituted vexatiously etc.**
>
> (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.
>
> Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.
>
> (2) The party may be ordered to pay the costs only if:

[1] Explanatory Memorandum [1].
[2] Explanatory Memorandum [5].

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

It is implausible to claim Bill has the rationale asserted for it in the Explanatory Memorandum, for the following reasons.

a. The Bill does not have the connection which the Government claims it has with the Inquiry, its terms of reference, and the Respect @ Work Report. The Inquiry's terms of reference were confined to "workplace sexual harassment".[3] Its recommendations were similarly confined, "to address sexual harassment in Australian workplaces." The recommendations seized upon for this Bill were specific to, and only contemplated, "sexual harassment in the workplace".
b. As the report explains, much of the impetus for the Inquiry was the momentum created by the #MeTooMovement.
c. Sexual harassment is a particular type of conduct prohibited by the Sex Discrimination Act 1984 (Cth) (SDA), quite different in nature from other acts prohibited by the SDA. "Harassment" is defined as behaviour constituted by particular characteristics. Under the SDA, sexual harassment is: any unwelcome sexual advance, unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature in relation to the person harassed, in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. Conduct constituting "discrimination" is defined in completely different terms, both within the SDA and across state and territory discrimination legislation.
d. The Bill expands extravagantly on Recommendation 25 made in the report:
    i. by applying to proceedings alleging *discrimination on any available ground* prohibited by Commonwealth legislation (i.e. age, sex, disability, race), not just those concerning *sex*

[3] "The Inquiry will review and report on:

- a national survey of the prevalence, nature and reporting of *sexual harassment in Australian workplaces*, by sector
- online *workplace-related sexual and sex-based harassment* and the use of technology and social media to perpetrate workplace-related sexual and sex-based harassment
- the use of technology and social media to identify both alleged victims and perpetrators of *workplace-related sexual harassment*
- the *drivers of workplace sexual harassment*, including whether:
    - some individuals are more likely to experience sexual harassment due to particular characteristics including gender, age, sexual orientation, culturally or linguistically diverse background, Aboriginal and/or Torres Strait Islander status or disability
    - some workplace characteristics and practices are more likely to increase the risk of sexual harassment
- the current legal framework with respect to *sexual harassment*
- existing measures and good practice being undertaken by employers in preventing and responding to *workplace sexual harassment*, both domestically and internationally
- the impacts on individuals and business of *sexual harassment*, such as mental health, and the economic impacts such as workers' compensation claims, employee turnover and absenteeism, and
- recommendations to address *sexual harassment in Australian workplaces*.

ii. by applying to Commonwealth proceedings alleging *unlawful discrimination*, not just *harassment* – even though harassment, particularly sexual harassment, is defined in terms which demonstrate that it is different in character from all other prohibited acts, and

iii. by not replicating the operation of section 570 of the *Fair Work Act 2009* (Cth) but instead creating something which bears no resemblance to it, which is asymmetrical, disproportionate and without justification (see next heading).

2. The impact of the Bill is asymmetrical, disproportionate and without justification.

Currently, costs are awarded to whichever party wins an action (i.e. if it succeeds in a substantive claim). The order is made by the courts on a discretionary basis (in accordance with the function of courts under Part III of the Constitution). An important consideration in deciding whether to sue in the Federal Court is the risk of having to pay the other side's costs if unsuccessful. At present, excessively zealous complainants have a reality check in the Federal Court, where a more objective assessment of the law occurs than in the conciliation stage before the Australian Human Rights Commission, which has been criticised in the past for its activism in discrimination claims. The court's ordinary powers to award costs currently operate to prevent a complainant being rewarded for instituting hopeless cases. The rulebook concerning costs would be rewritten by this Bill.

To summarise the Bill, it directs that the Federal Court:

a. *must* (not may) order the respondent to pay the applicant's costs, *even if* the applicant succeeds on only one ground of many. The only claim which the applicant wins may be insignificant relative to the substantive and numerical weight of the matters which the respondent wins. Such an award against the respondent may be on an indemnity basis, which has potential to greatly enlarge the size of the award.

b. *may* (not must) order the applicant to pay the respondent's costs *only if* the claim was vexatious or unreasonable (hopeless) and the respondent does not have a "significant power advantage" over the applicant and does not have significant financial resources relative to the applicant. No mention is made of such an award on an indemnity basis.[4]

This means that a person may bring a hopeless claim with little fear of costs being awarded against them. A successful respondent will no longer be entitled to an award of costs, except in the most exceptional

[4] *Circumstance where the complainant can be made to pay the respondent's costs (it is difficult to imagine how it could ever happen)*

The court *may* only order that a complainant pay a respondent's costs where:

- the complainant instituted the proceedings vexatiously or without reasonable cause; or the applicant's unreasonable act or omission caused the other party to incur the costs – this is more or less as far as the *Fair Work Act* went.
- AND all of the following apply (this is new):
  - the other party is a respondent who was successful in the proceedings;
  - the respondent does not have a significant power advantage over the applicant
  - the respondent does not have significant financial or other resources, relative to the applicant.

The last two conditions this would rule out any possibility of a Chrisitan entity like a school being eligible to have costs awarded in its favour, even though the proceedings were brought vexatiously or without reasonable cause.

Circumstance where the respondent must be made to pay the complainant's costs (the norm)

- The court must order that a respondent pay a claimant's costs where an applicant is successful in proceedings on any one ground against a respondent, even though that ground may be relatively immaterial in the scheme of things, and the respondent may have succeeded on scores of substantive grounds.
- However, if the court is satisfied that the applicant's unreasonable act or omission caused the applicant to incur costs, the court is not required to order the respondent to pay the costs incurred as a result of that act or omission.

circumstances. Even then, a costs award will almost never be a possibility for a successful respondent like a religious institution, because in comparison with an individual applicant they are easily said to have "significant financial resources" relative to an individual.

The Bill would mean that:

a) only in inconceivably rare circumstances could costs be ordered against a complainant (and even then it would be on a *discretionary* basis), and yet
b) the respondent *must* always pay the complainant's costs wherever a complainant is successful in proceedings on any one ground, even though the respondent may have succeeded on scores of grounds, and substantively overall.

The Bill is excessively one-sided, and prescriptive when the courts discretion should instead be applied, on traditional grounds.

The Bill bears no resemblance to section 570 of the *Fair Work Act 2009* (Cth). There has never been any costs-related legislation like this in Australia.

3. The Bill would weaponise discrimination law and divide Australian society

The Explanatory Memorandum states that there are "sufficient safeguards against the possibility of incentivising the making of unmeritorious claims." This is never openly and fully elaborated. It is simply asserted. We refute it.

The Bill will have disproportionate, extremely adverse impact on Christian and faith-based schools and educational institutions if, as the Government appears intent upon, the exemptions in the SDA are to be removed, or reduced so they have no value in enabling such institutions to operate in accordance with their ethos.

It would make discrimination law activism virtually cost and risk free for complainants. Australians may be financially ruined for things that should never have been alleged under discrimination legislation in the first place.

It is reasonable to ask why this Bill was introduced so long (more than three and a half years) after the Respect@Work report? Why has it been resurrected, and in such a different guise? The Bill comes at a time when debate on Commonwealth discrimination legislation is politically overheated, as the exemptions in the SDA are under review, and Labor's proposals for a Religious Discrimination Bill (RDB) are about to be released. The Inquiry earlier this year into religious educational exemptions suggests a firm resolve to remove those exemptions altogether, especially for Christian and faith-based schools etc. It is also expected that the Government will propose a weak RDB. This Bill has all the appearance of an agenda targeting people of faith.

The result of the Bill in that context would be that Christian and faith-based schools and the like will become exposed to an entirely new range of discrimination claims under the SDA simply for operating in accordance with their ethos. This is itself unacceptable given that the principal reason for Christian and faith-based schools being over-exposed under the SDA is the successive expansion of the prohibitions under the SDA, including by recently adopted terminology like "gender identity". Christian schools remain a highly popular choice among Australians. The problem is that their ideology does not fit with Labor's current ideology.

By this Bill the Government would take its legislative opposition to Christian and faith-based schools a leap further. It would weaponise discrimination law by giving every possible encouragement to activists to take discrimination claims against Christian and faith-based schools, and individuals, with potentially ruinous consequences for those targeted.

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There are also serious fair trial implications with this Bill, when anyone facing discrimination allegations is immediately exposed to potentially devastating costs orders. They are coerced into settling. A new punishment system would be established, allowing complainants to pick their targets without any risk to themselves.

The true effect of the Bill would therefore be to transform the dynamics of discrimination litigation, at least in the following ways:

a) The Bill would weaponise discrimination law against targeted respondents. Proceedings could only be defended at unfeasible financial risk. Respondents would have every incentive to admit accusations to avoid costs orders even when their case is strong and meritorious. They would thereby be denied justice. There is a fundamental fair trial issue with the Bill.
b) The Bill empowers the AHRC (and other commissions at state and territory level if this model is followed) to support and encourage political activism.
c) The asymmetrical, disproportionate and unjustified impact of the Bill, already mentioned, raises fundament issues of equality and discrimination, including by reason of excessively and insupportably disadvantaging Christian schools in the current legislative environment.
d) The Bill offends fundamental human rights, including:
    i. the fair trial principles of equality of arms (International Covenant on Civil and Political Rights (ICCPR) art 14);
    ii. the right to equal protection of the law (ICCPR art 26);
    iii. the principle of equality before the law (ICCPR art 26);
    iv. the right to protection against discrimination in the enjoyment of ICCPR rights (ICCPR art 2).

The Explanatory Memorandum ignores these issues.

4. The Bill departs from established principles concerning costs awards.

This submission has addressed the effect of section 570 of the FWA. That is one well known legislative regime in relation to costs in statutory actions in industrial contexts and the like.

The normal regime in civil litigation is that costs are in the discretion of the Court[5] but ordinarily costs follow the event.[6] As the High Court has said: "The expression the 'usual order as to costs' embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation."[7]

The grounding of the regime in "fairness and policy" to compensate a successful party for costs it would not otherwise have incurred is critical. True it is that some regimes like section 570 of the FWA have amended that principle, to encourage claims by workers who may not have the resources to face an adverse costs order, and so would be discouraged from bringing a claim. Tribunals like the Civil and Administrative Tribunals often are virtually "no costs" jurisdictions.[8] But those regimes do not detract from the fact that in litigation a

[5] See *Federal Court of Australia Act 1973* section 43.
[6] *Oshlack v Richmond River Council* [1993] HCA 11; (1998) 193 CLR 72 at [67]
[7] Ibid.
[8] South Australian Civil and Administrative Tribunal Act 2013 section 57-unless the Tribunal orders parties bear their own costs.

successful party is put to expense which need not have been incurred and could have been expended on more profitable matters.

However, none of the existing regimes are like that which is now proposed. That is to consider in relation to costs, not the merits of the litigation, but the nature and financial capacities of the parties vis-à-vis each other in making a costs order. The Court is directed to look not only to the issues raised in relation to the dispute, but as to the nature of each party in relation to each other. This is a fundamental, philosophical, shift and it may be the first time this has occurred in Australian jurisprudence. In shifting attention from the issue to the litigant, the proposal is irredeemably flawed.

The requirements that the Court consider whether "the respondent does not have a significant power advantage over the applicant and the respondent does not have significant financial or other resources, relative to the applicant" introduce concepts that will significantly increase the burden of bringing and defending claims and hence the costs of litigation. The Court may have to consider the balance sheets and profit and loss statements of respondent companies, as well as the personal financial position of applicants. That is information that is normally not discoverable in litigation. Both parties may not want their positions known to the world at large. Yet that is one likely result of the proposals.

The question of "power advantage" is a nebulous one. Will an applicant supported by a union have to disclose all assistance received from the union and the financial position of the union? How else is the Court to make a fair assessment of the power advantage unless it knows the power position of those supporting the applicant? An applicant's resources will no doubt include details of pro bono assistance. That may include the financial capacity and resources of those providing the assistance.

In making an offer to settle a matter a respondent will ordinarily take into account any advice as to the prospects of its defence and the proportionate likelihood of orders against them. In addition to such considerations a respondent will now need to make an assessment of the "power advantage" and relative financial position of the applicant at the time of assessing the prospects of the applicant's claim. A respondent will often not have sufficient information to make such an assessment. This degree of uncertainty will cause unfair prejudice to respondents, who will seek to settle even claims with little or no prospect on account of the imbalanced costs regime. This represents a fundamental denial of justice to respondents including Christian schools and other religious institutions.

These matters show that not only is the proposal wrong in principle; it is poorly thought through. It should be abandoned.

It is not hard to see a biased lens in the proposal. The respondents are thought to be large entities with abundant resources. Applicants are the "battlers" oppressed by the system. Yet most respondent entities may be small to medium businesses which have been built up by the hard work of their promoters and supporters. For example, Christian schools have been built up by the support of ordinary hardworking Australians. The history of litigation shows that just as there are meritorious applicants, there are those who do bring vexatious claims.

It is foreseeable that many of the respondents to discrimination claims will be Christian schools and other religious charities. The regime will reduce the amount of funds available for charities to further their public benefitting purposes within the wider community. The imbalanced preferencing of unmeritorious claims will also likely have an increase in the insurance premiums payable by respondents, again decreasing funds available to the pursuit of charitable purposes within the community. The degree of imbalance within the proposed regime may even cause religious institutions to withdraw from providing public services that could give rise to claims against them. This will be to the detriment of all Australians.

5. Conclusion

The Bill is wrong in principle because of the human rights implications, because it is divisive of Australian society, and is inimical to the interests of justice.

A better, and fair, response would be to produce access to justice by public funding for any party that lacks it, either to make or defend allegations.