

The logo for Caxton, featuring the word "caxton" in a stylized, lowercase, red font. The letters are bold and have a slightly irregular, hand-drawn appearance. A vertical blue line is positioned to the left of the logo.

caxton

legal centre inc

Submission to the Senate Standing Committee
on Legal and Constitutional Affairs

**Inquiry into the Human Rights and
Anti-Discrimination Bill 2012 –
Exposure Draft Legislation**

December 2012

Introduction

Caxton Legal Centre is Queensland's oldest community legal centre. Established in 1976, Caxton Legal Centre is a generalist service with a number of specialist programs providing more than 9,000 advices a year.

In the past 10 years Caxton has conducted numerous discrimination matters in the Federal and State jurisdictions including matters concerning the following grounds:

- Race;
- Sexuality;
- Nationality; and
- Disability.

Some of these matters have settled in mediation and some have successfully proceeded through protracted hearings and appeals in both jurisdictions.

As a result of these cases we have gained some practical knowledge about some of the issues arising for both complainants and legal practitioners in the discrimination field.

Qualified Endorsement of NACLCL Submission

Caxton Legal Centre has had the benefit of reading the draft submission of the National Association of Community Legal Centres (NACLCL).

We endorse the NACLCL submission subject to where we hold differing views, as outlined below, regarding the costs provisions.

Costs

1. Each party to bear their own costs

We have significant reservations about the unintended impact of the proposed 'each party bear their own costs' default provision.

The intention of the proposed provision is to ensure that worthy complainants are not unduly dissuaded from bringing proceedings in Commonwealth courts for fear of incurring the other party's costs. However, in our view the practical consequence of this provision may be the failure to prosecute significant and complex discrimination cases for want of the ability of complainants to secure appropriately experienced legal representation.

Of the discrimination cases undertaken by Caxton Legal Centre in recent years, all but one of them has involved the engagement of Counsel on conditional fee agreements. These agreements incentivise Counsel to bring a sharp focus to the prospects of success of the complaint and to make an early assessment of the evidential and legal issues to determine whether the amount of work that will be asked of them to prepare for the hearing is warranted in all of the circumstances.

Some discrimination matters require Counsel to commit to days (and in some cases weeks) of preparation and hearing time, and in the absence of any reliable legal aid civil law funding scheme, it is simply unrealistic, if not unreasonable, to expect Counsel to provide such representation on a pro bono basis.

Therefore, without the prospect of recovering costs at the conclusion of successful proceedings, complainants will struggle to retain Counsel and will encounter greater pressure to settle complaints on less than favourable terms at conciliation.

A further consequence will be the failure to develop a strong jurisprudence which will inevitably be required to provide interpretative guidance on the proposed significant changes to the legislative framework.

2. Unfair Advantage to Respondents

Conversely, the default provision will benefit well resourced respondents who will have no difficulty in retaining high quality representation on commercial terms.

Further, in the absence of any risk of costs being awarded against them, Respondents will be liberated from the deterrence of costs to engage in interlocutory proceedings with the effect of driving up costs to the complainant (and the administration of justice) and with the intention of winning the 'war of attrition'.

3. 'Non-Public Interest' Complaints

As has been recognized by the courts¹, there are some discrimination matters that do not involve matters of public interest. Some of these may involve complainants who are sufficiently resourced to engage private lawyers on 'normal' retainers. It is submitted that these complainants would unfairly lose the benefit of their success by having to wear the burden of their own lawyer's fees, which will usually far exceed any award of damages or compensation.

4. Assistance provided to parties

¹ *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*, [2007] FCA 974, [27].

Clause 133(3) sets out the matters to which the court must have regard, including:

(b) whether any party to the proceedings is receiving assistance under section 130, or is receiving assistance by way of legal aid (and if a party is receiving any such assistance, the nature of that assistance).

This provision would presumably enable the Court to take into account whether it is appropriate to award costs to a complainant if they have already received assistance from the Attorney General or “legal aid”. It is not clear however whether this is intended to be a matter that would support the award of costs (to be recovered by the Attorney General or legal aid) or to be taken as consideration against the award of costs.

There are a couple of issues arising from this provision:

Firstly, it should be clarified that services provided by CLCs ought not be considered “assistance by way of legal aid”.

Secondly, under existing Commonwealth funding agreements, CLCs are contractually bound to recover costs in any costs jurisdiction. In order to do so, most CLCs undertaking litigation enter into client agreements which provide for the recovery of legal costs in the event of a successful outcome. It is submitted that the circumstance of a successful party being represented by a CLC should be considered favourably as a factor warranting an award of costs.

5. Effect of Offers to Settle

Clause 133(3)(e) includes whether a party has made an offer and the terms of that offer as a factor that the Court must consider in making an order for costs.

As was pointed out by Crennan J in *Jacomb v Australian Municipal Administrative Clerical & Services Union*², the question of whether a party should be penalised for rejecting an offer that was more generous than the result of the proceedings should also involve consideration of the public interest issues involved, and an assessment of whether in all of the circumstances the party acted unreasonably. For this reason the issue of offers to settle should be considered within the question of the overall conduct of the parties in the course of the proceedings.

6. Recommended Replacement Clause

It is suggested that Clause 133 be replaced with a provision providing a general discretion to the court to award costs subject to a requirement that it must consider the following matters:

² 2004] FCA 1600, [12].

- (a) The financial circumstances of each of the parties to the proceedings;
- (b) The nature and terms of any costs agreement between a party and their legal representatives;
- (c) The conduct of the parties to the proceedings;
- (d) Whether the proceedings concerned matters of significant public interest; and
- (e) Whether the complaint was vexatious, frivolous or lacking in substance.

Clause 23 – Justifiable Conduct

We are concerned that this exception is drafted in terms that are too vague and has the effect of lowering the existing standards, particularly for direct discrimination under the *Racial Discrimination Act 1975* (Cth).

Criminal Record

We share the concerns expressed by the Prisoners Legal Service about the removal of protection against discrimination on the basis of criminal record and support their submission of adding ‘irrelevant criminal record’ as a protected attribute to the list in section 17(1).

Caxton Legal Centre Inc

Scott McDougall
Director

20 December 2012