GRATA FUND

19 October 2023

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

By email only: human.rights@aph.gov.au

Dear Secretary

Inquiry into Australia's human rights framework - response to additional questions received from the Committee

We thank the Parliamentary Joint Committee on Human Rights (**the Committee**) for inviting Grata Fund to give evidence at the inquiry into Australia's human rights framework public hearing in Sydney on 28 September 2023.

We write to respond to two additional questions that Grata Fund received from Senator Thorpe after our appearance at the hearing.

Additional questions received from Senator Thorpe

Senator Thorpe asked Grata Fund to respond to the following question:

> *Q1. Governments legislation, policy and institutions are ones who are often responsible for the most egregious human rights abuses, we look at our immigration system, the NDIS, the aged care system, police, prisons, social services. Can we trust the parliament to act in good faith without being a proper check and balance through constitutionally defined rights?*

We wish to provide the following response:

> There are global examples of written constitutions enshrining fundamental human rights. However, in Australia, the process of substantial constitutional amendment presents practical challenges. As such, we support the views put forward by the Australian Human Rights Commission and our colleagues in the human rights sector and academia about the appropriateness of a legislated Human Rights Act within Australia's democratic system of government that is congruent with international law and treaty obligations. We affirm the importance of scrutinising the strength of any legislation that is put forward, to ensure that it can operate effectively in holding legislative processes, policy decision-making and institutional conduct to the standards enshrined in a Human Rights Act.

Senator Thorpe also asked Grata Fund to respond to the following question:

> *Q2. Do you think the AHRC framework on ensuring equal access will properly address systemic issues that already exist especially intersectional barriers where the most vulnerable are least able to pursue remedies?*

We wish to provide the following response:

> In its 'Free and Equal' position paper, the Australian Human Rights Commission (**the Commission**) proposed an 'equal access to justice' duty for public authorities, designed to complement an overarching participation duty. We support the Commission's view that Australia's human rights framework should require public authorities to take steps to ensure equal access to justice. These steps might include facilitating access to legal assistance, interpreters and disability support for individuals navigating the justice system. This approach rightly recognises the intersectional barriers facing the individuals and communities experiencing breaches of their human rights and seeking remedies.
>
> However, Grata Fund submits that, in order to be effective, the Commission's equal access to justice principles must be complemented by an **equal access costs model** in any proceedings brought under a federal Human Rights Act. To ensure genuine and equitable access to human rights remedies, it is crucial that people have meaningful access to every part of the justice system, especially the courts when complaint or conciliation efforts fail. An equal access costs model would remove the adverse costs risk for complainants in

human rights proceedings so they can take meritorious cases to court with the confidence that, even if they happen to lose, they will not be subject to an adverse cost order.

We already see that the risk of an adverse costs order is often an insurmountable barrier for people trying to enforce their rights through the courts in a range of areas including discrimination, environmental and constitutional law. We refer to our submission to this inquiry, which details how the default costs rules in litigated public interest cases deter people with meritorious claims from being able to access human rights remedies through the courts. The default costs rules also tend to reinforce the significant power imbalance that exists between a complainant and the government or corporation they allege has violated their rights, while also allowing unlawful behaviour to continue unchecked.

We cannot let this dynamic play out under a federal Human Rights Act. By legislating an equal access costs model for human rights proceedings, Parliament will ensure greater access to remedies for complainants and marginalised communities, and also support the judiciary to perform its constitutional role in interpreting and applying human rights standards. This will go some way in remedying the intersectional barriers facing vulnerable members of the community and encourage upfront compliance with a federal Human Rights Act by strengthening the ecosystem of accountability for human rights protection.

The equal access costs model is not new. It has already been adopted for whistleblowers under the *Corporations Act 2001* (Cth), the *Public Interest Disclosure Act 2013* (Cth) and the *Taxation Administration Act 1953* (Cth). It is also being considered as a costs model that could be applied in federal discrimination matters, in recognition of the significant public interest that is served when individuals step out to ensure that unlawful behaviour is publicly censured and stopped.

A federal Human Rights Act similarly relies on the willingness of individuals to come forward to enforce their rights and, as a result, reduce human rights breaches across the board - a benefit ultimately enjoyed by the wider community. In light of this, a federal Human Rights Act should implement an equal access costs model to ensure that costs risk does not disqualify meritorious complainants from bringing proceedings to court and accessing meaningful remedies.

Should the Committee require any further information or clarification, please do not hesitate to contact us.

Yours sincerely

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