

22 December 2023

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

via email: legcon.sen@aph.gov.au

Dear Committee Secretariat,

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

Thank you for the opportunity to provide a submission on the provisions of the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (**Bill**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director and senior leadership community, with more than 50,000 members from not-for-profits (**NFPs**), large and small and medium enterprises (**SMEs**) and the government sector.

The AICD has focused on the board's role in preventing and responding to workplace sexual harassment since the landmark release of the Australian Human Rights Commission (**AHRC**) Respect@Work Report in January 2020. Respect@Work recommended that the AICD develop education and training for board members on good governance in relation to gender equality and sexual harassment (see Section 2 below).

For the Committee's reference, the AICD previously recommended an alternative 'equal access' model whereby the successful complainant would always recoup their reasonable costs from a respondent, and an unsuccessful complainant would not face an adverse costs order, except in exceptional circumstances. We are pleased that a similar approach has been set out in the Bill and support its implementation.

The AICD has also contributed to several previous consultations on related legislative and regulatory reforms, including the:

- former Government's 2021 consultation on the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Amendment Act)*, where we supported legislative changes to both the *Sex Discrimination Act 1984 (SD Act)* and the *Fair Work Act 2009 (FW Act)*;¹
- former Government's 2022 consultation to progress further legislative recommendations, where we provided support for the implementation of a positive duty on employers to prevent sexual harassment;²

¹ AICD submission – Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Bill). Available [here](#).

² AICD submission – Options to progress further Respect@Work Report recommendations. Available [here](#).

- Respect@Work Taskforce's stakeholder consultation on proposed legislative reforms, where we recommended the costs model be further enhanced to encourage complainants to come forward with less fear of legal expenses; and
- Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, where we again proposed that a successful complainant should always recoup their reasonable costs from a respondent.³ If a complainant were unsuccessful, they would only bear their own costs and not the respondents, except in the case of frivolous, vexatious or unmeritorious claims.

1. Comments on the Bill

General comments

- The AICD supports removing disincentives to applicants bringing civil proceedings in this area, such as an unsuccessful plaintiff being ordered to pay the other party's legal costs, except in exceptional circumstances. As the AHRC noted in *Free and Equal: A reform agenda for federal discrimination laws (2021)*, 'costs rules frame the whole approach for complainants.'
- The AICD therefore supports the Bill's default position that the 'applicant must not be ordered by the court to pay costs incurred by another party to the proceedings.'

Where a respondent must be ordered to pay the applicant's costs

- The AICD supports the Bill's approach that a complainant that is successful on one or more grounds, must have a costs order made in their favour. This is important for complainants in terms of access to justice, as applicants would be able to initiate proceedings in the knowledge that, if they are successful, they will have their legal costs met by the respondent.

Where an applicant can be ordered to pay the respondent's costs

- The AICD supports the Bill's position that an unsuccessful applicant will not be ordered to pay a respondent's costs unless the applicant commenced proceedings vexatiously or without reasonable cause. We note that this proposal is very similar to a previous AICD recommendation from an earlier consultation.⁴
- The AICD notes however the Bill's proposal that an unsuccessful applicant may be ordered to pay the respondent's costs if the applicant's unreasonable act or omission caused the applicant to incur costs. Whilst the Explanatory Memorandum notes this is 'intended to be a high threshold and reserved for rare cases,' we recommend the Bill's drafting make this more explicit. It is important that such a provision does not unintentionally deter applicants from bringing proceedings.
- The AICD supports the Bill's provision that an unsuccessful applicant may be ordered to pay a respondent's costs if the respondent is successful on all grounds and does not have a significant power advantage over the applicant and significant financial or other resources relative to the applicant. The AHRC notes that 'Complaints of unlawful discrimination are often made against individuals and small businesses.'⁵ We agree with the Diversity Council of Australia on the need to balance the potential cost burden placed on organisations, particularly NFPs and smaller businesses.⁶

³ AICD submission – Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022. Available [here](#).

⁴ AICD submission – Options to progress further Respect@Work Report recommendations. Available [here](#).

⁵ Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 Inquiry – AHRC, Submission. Available [here](#).

⁶ Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 Inquiry – Diversity Council of Australia, Submission. Available [here](#).

2. AICD initiatives to support implementation of the Positive Duty

For the Committee's background, in October and December 2023 respectively, the AICD released a:

- **Director's guide** – [Positive duty to prevent workplace sexual harassment](#), an update to the April 2021 AICD director tool, which outlines key governance steps and questions to ask in the boardroom to assist directors meet their obligations, consistent with the AHRC's Positive Duty Guidelines. This guide also includes a snapshot for directors covering guidance across leadership, culture, knowledge, and risk management. The AICD also hosted a [webinar](#), featuring Sex Discrimination Commissioner, Dr Anna Cody, to discuss the guide.
- **Joint research with the Australian Council of Superannuation Investors (ACSI)** – [Positive duty: preventing and responding to workplace sexual harassment - Insights from Australian directors](#), examining board governance practices preventing sexual harassment and other harmful conduct in the workplace. The joint AICD/ACSI resource includes an AHRC foreword by Sex Discrimination Commissioner, Dr Anna Cody. The joint resource provides real-world insights from experienced ASX listed company directors on their board oversight practices, identifies common challenges that directors face and highlights better governance practices.

3. Next steps

We hope our response will be of assistance to the Committee. If you would like to discuss any aspects further, please contact Laura Bacon, Senior Policy Adviser, at [redacted] or Sean Dondas, Policy Adviser at [redacted]

Yours sincerely,

Christian Gergis
Head of Policy