



**Australian
Human Rights
Commission**

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

Australian Human Rights Commission

Submission to the Senate Legal and Constitutional Affairs
Legislation Committee

19 December 2023

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1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023. The Commission welcomes the opportunity to make a submission to this inquiry.
2. The Bill aims to achieve the objectives of recommendation 25 of the Commission's 'Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report' (Respect@Work report).¹ Recommendation 25 proposed that the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) be amended to insert a cost provision consistent with s 570 of the *Fair Work Act 2009* (Cth) (Fair Work Act).²
3. The Bill proposes reforms to replace the current costs regime in the AHRC Act with a modified 'equal access' costs protection, or asymmetrical, model for all proceedings in the Federal Court of Australia (FCA) and Federal Circuit and Family Court of Australia (FCFCA) involving complaints of unlawful discrimination. This costs model would apply to all proceedings that may arise under each of the federal anti-discrimination laws.
4. The question of an appropriate costs model for Commonwealth anti-discrimination laws has been the subject of significant consultation by the Commission and the Attorney-General's Department (AGD). The Commission has provided submissions to this Committee and the AGD in relation to these matters in:
 - its submission to the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (October 2022),³ and
 - its response to the AGD's 'Consultation Paper: Review into an appropriate cost model for Commonwealth anti-discrimination laws' (April 2023).⁴
5. The Commission acknowledges that the question of an appropriate cost model that is fair, certain and facilitates access to justice, is complex and reasonable minds may differ on the most beneficial model. The Commission welcomes reform of these laws.

2 Recommendations

6. The Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the Bill be amended to enable the court to have regard to settlement offers made prior to, and during, the proceedings in the determination of costs.

If the current s 46PSA of the AHRC Act is repealed and this consideration is not expressly provided for in the Act, the Commission considers that the Explanatory Memorandum to the Bill should be amended to include the unreasonable rejection of a settlement offer as an example of a possible 'unreasonable act or omission' under proposed ss 46PSA (4) and (6)(b).

Recommendation 2

The Commission recommends that the Bill be amended to enable the court to have regard to the participation of the parties in the Commission's complaints process in the determination of costs, to align with s 570(2)(c) of the Fair Work Act.

Recommendation 3

The Bill be amended to provide for a review of the amendments within three years of the commencement of the provisions, having particular regard to:

- the effectiveness of the provisions
- the impacts of the amendments on both applicants and respondents, including access to representation, outcomes for parties, costs recovery and costs exposure
- the impacts of the amendments on the Commission's complaint processes, including any impacts on the engagement and participation of the parties in the Commission's complaints processes and the effectiveness of the Commission's conciliation function, and
- the impacts of the amendments on the number of matters proceeding to court, and the outcomes in those matters.

3 Proposed reforms

7. The Commission has heard through consultation processes for its National Inquiry into Sexual Harassment in Australian Workplaces (Respect@Work inquiry) and its Free and Equal project that the current costs regime in the federal courts operates as a disincentive for complainants to pursue unlawful discrimination matters, particularly for vulnerable members of the community.
8. The Bill proposes reforms to replace the current costs regime in the AHRC Act with a modified 'equal access' costs protection, or asymmetrical, model for all proceedings in the federal courts involving complaints of unlawful discrimination arising under each of the federal discrimination laws.
9. The model proposed in the Bill is a significant departure from the position under the current federal discrimination laws, providing greater costs certainty for applicants and removing the disincentives reported in consultations conducted by the Commission to pose significant deterrents to applicants in bringing claims of unlawful discrimination in the FCA and FCFCA.⁵ In seeking to achieve this, the costs provisions proposed are weighted more heavily in favour of applicants and shift the burden of costs liability to respondents.
10. The proposed regime also differs from the models recommended in the Respect@Work report, which recommended a model where each party bears their own costs, and the Commission's 'Free and Equal: A reform agenda for federal discrimination law — Position Paper' (Free and Equal position paper),⁶ which recommended a model where each party bears their own costs with discretion for the court to award costs in the interests of justice having regard to prescribed mandatory criteria. In the Commission's view, these models represent a more balanced approach to costs for claims of unlawful discrimination.
11. As Australia's National Human Rights Institution, the Commission is concerned that the reforms proposed may have unintended consequences on the effectiveness of alternative dispute resolution options aimed at facilitating early resolution of complaints, including settlement offers and the Commission's conciliation function, and may impact on the Commission's role in stemming the flow of complaints that proceed to court. The Commission is also concerned with the way the proposed reforms balance fairness to smaller sized respondents.

3.1 Potential unintended consequences

12. The Commission raises concerns that the model proposed in the Bill may have unintended consequences on the efficacy of alternative dispute resolution options, including early offers of settlement and conciliation processes, and the processes of the Commission as a filter for complaints proceeding to court.
13. First, the Bill removes s 46PSA of the AHRC Act, which currently provides that the court, in deciding whether to award costs in proceedings, may have regard to offers to settle the subject matter of a complaint. Second, the Explanatory Memorandum to the Bill seeks to exclude from the Court's consideration the unreasonable rejection of settlement offers when considering whether an applicant's 'unreasonable act or omission' caused the applicant to incur costs.⁷ The operation of these two amendments may mean that there is little incentive for an applicant to consider a reasonable offer to settle a matter early or at all.
14. This is contrary to the position under the Fair Work Act, under which the term 'unreasonable act or omission' has been interpreted to include the unreasonable rejection of a settlement offer.⁸ While the Commission understands the impetus to ensure certainty for applicants in their costs exposure, removing the court's consideration of reasonable settlement offers may have the unintended consequence of invalidating the effect of an early settlement offer and significantly impacting on alternative dispute resolution and settlement options prior to trial and the final determination of proceedings.
15. Additionally, unlike the Fair Work Act, the Bill and Explanatory Memorandum explicitly exclude from the court's consideration whether the parties unreasonably refused to participate in the complaints process before the Commission.⁹ The Fair Work Act expressly provides for the court to have regard to whether a party unreasonably refused to participate in the complaints process before the Fair Work Commission in its determination of costs,¹⁰ separate to its express ability to consider a party's 'unreasonable act or omission' which caused the other party to incur costs.¹¹ In expressly removing this from the court's consideration of an appropriate award of costs, the proposed reforms may significantly reduce the incentive for parties to take genuine steps to resolve a complaint and meaningfully engage in the Commission's complaints and conciliation process, significantly hampering the effectiveness of the Commission's functions and processes.

16. With the removal of incentives to resolve complaints through settlement offers and for meaningful engagement in the Commission's complaints and conciliation process, the proposed model may lead to an increase in the number of matters proceeding to court and to final determination at trial.
17. 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.
18. For these reasons, the Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the Bill be amended to enable the court to have regard to settlement offers made prior to, and during, the proceedings in the determination of costs.

If the current s 46PSA of the AHRC Act is repealed and this consideration is not expressly provided for in the Act, the Commission considers that the Explanatory Memorandum to the Bill should be amended to include the unreasonable rejection of a settlement offer as an example of a possible 'unreasonable act or omission' under proposed ss 46PSA (4) and (6)(b).

Recommendation 2

The Commission recommends that the Bill be amended to enable the court to have regard to the participation of the parties in the Commission's complaints process in the determination of costs, to align with s 570(2)(c) of the Fair Work Act.

3.2 Balance of burden

19. Complaints of unlawful discrimination are often made against individuals and small businesses. These proposed reforms require the court to order the respondent to pay the applicant's costs whether the applicant is wholly or only partly successful in the proceedings and must not order the applicant to pay the respondent's costs unless an exception applies. A respondent's circumstances can only be considered where the respondent is 'successful in the proceedings', which requires 'all claims against them to be dismissed'.¹²

20. By way of example, where a respondent is found to be 80 or 90% successful, and may have made reasonable offers to settle the matter:
- the court must order the respondent to pay the applicant's costs,¹³ unless the applicant's unreasonable act or omission caused the applicant to incur costs. This is 'intended to be a high threshold and reserved for rare cases',¹⁴ and
 - the applicant cannot be liable for the respondent's costs, unless the applicant's unreasonable act or omission caused the respondent to incur costs.¹⁵ The court cannot have regard to the respondent's circumstances, including any power imbalance between the parties or the financial or other resources of the respondent relative to the applicant.
21. Even where a respondent is 'successful in the proceedings', and the applicant's claims do not meet the tests for the exceptions in proposed ss 46PSA(6)(a) or (b),¹⁶ the court must be satisfied that the respondent's circumstances meet the requirements of ss 46PSA(6)(c)(i), (ii) and (iii) before it may order the applicant to pay the respondent's costs. That is, in addition to having all claims against the respondent dismissed by the court, the respondent must not have a significant power advantage over the applicant, and it must not have significant financial or other resources relative to the applicant, before it may recover any of its costs from the applicant.

4 Review

22. Given the matters raised above, the Commission considers a review of these reforms within three years of commencement is warranted to ensure the reforms do not have unintended consequences on the efficacy of alternative dispute resolution options and are operating fairly.

Recommendation 3

The Commission recommends that the Bill be amended to provide for a review of the amendments within three years of the commencement of the provisions, having particular regard to:

- the effectiveness of the provisions
- the impacts of the amendments on both applicants and respondents, including access to representation, outcomes for parties, costs recovery and costs exposure

- the impacts of the amendments on the Commission’s complaint processes, including any impacts on the engagement and participation of the parties in the Commission’s complaints processes and the effectiveness of the Commission’s conciliation function, and
- the impacts of the amendments on the number of matters proceeding to court, and the outcomes in those matters.

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- ¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) (Respect@Work report), 507 at <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>
- ² Respect@Work report, 507.
- ³ Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*, Submission 26 (October 2022) at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/RespectatWork2022/Submissions.
- ⁴ Submission to Attorney-General’s Department, *Review into an appropriate cost model for Commonwealth anti-discrimination laws* (April 2023), at https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/consultation/download_public_attachment?sqlId=question-2022-01-06-6908678210-publishablefilesquestion-1&uuld=196811541.
- ⁵ See, for example, Respect@Work report, 507.
- ⁶ Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination law — Position Paper* (2021) at <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>, 191-201.
- ⁷ Explanatory Memorandum, *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* [13] at: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7110_ems_e83e5b49-1a08-484a-97d2-ee6f3ce685bc/upload_pdf/JC011446.pdf;fileType=application%2Fpdf
- ⁸ *Fair Work Act 2009* (Cth), s 570(2)(b); see, for example, *Adamczak v AlSCO Pty Ltd (No. 4)* [2019] FCCA 7.
- ⁹ Explanatory Memorandum, *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* [13] at: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7110_ems_e83e5b49-1a08-484a-97d2-ee6f3ce685bc/upload_pdf/JC011446.pdf;fileType=application%2Fpdf
- ¹⁰ *Fair Work Act 2009* (Cth), s 570(2)(c).
- ¹¹ *Fair Work Act 2009* (Cth), s 570(2)(b).
- ¹² Explanatory Memorandum, *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* [16] at:

https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7110_ems_e83e5b49-1a08-484a-97d2-ee6f3ce685bc/upload_pdf/JC011446.pdf;fileType=application%2Fpdf

¹³ Australian Human Rights Commission Amendment (Costs Protection) Bill 2023, s 46PSA(4).

¹⁴ Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 [13] at:

https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7110_ems_e83e5b49-1a08-484a-97d2-ee6f3ce685bc/upload_pdf/JC011446.pdf;fileType=application%2Fpdf

¹⁵ Australian Human Rights Commission Amendment (Costs Protection) Bill 2023, s 46PSA(6)(b). Section 46PSA(6)(a) also provides an exception for where ‘the applicant instituted the proceedings vexatiously or without reasonable cause’, however the test for this exception would not be met if the applicant was partially successful.

¹⁶ Section 46PSA(6)(a) requires an applicant to have ‘instituted the proceedings vexatiously or without reasonable cause’. Section 46PSA(6)(b) provides an exception for where an applicant’s ‘unreasonable act or omission’ caused the respondent to incur the costs.