GRATA FUND

5 February 2024

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

**By email only: legcon.sen@aph.gov.au**

Dear Secretary

**Inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 - response to question taken on notice**

We thank the Senate Legal and Constitutional Affairs Committee (**the Committee**) for inviting Grata Fund and the Public Interest Advocacy Centre (**PIAC**) to give evidence at the inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (**the Bill**) on 31 January 2024.

We write to respond to a question that Senator Scarr asked Grata Fund and PIAC to take on notice at the public hearing. Noting our organisations' joint written submission to the inquiry and joint appearance at the hearing, we provide this response on behalf of both organisations. Due to the short timeframe available for the preparation of our response, we are providing limited comments.

Senator Scarr asked us to respond to a view expressed by the Law Council of Australia in its written submission to the inquiry that the equal access costs model

being contemplated in the Bill 'would operate on a significantly wider basis than comparable models overseas'.[1]

We respectfully disagree with this view. There are a range of protective costs models that exist overseas in areas of rights-based, discrimination and other public interest law. The modified equal access model proposed in the Bill bears similarities to various long-standing costs principles that exist in overseas jurisdictions, and offers an excellent way forward to increase access to justice and improve the implementation of anti-discrimination laws in Australia.

We have outlined below a range of comparable costs models that operate in international jurisdictions, and note that this list is not exhaustive.

**South Africa**

In South Africa, the Constitutional Court has long been alive to the potential chilling effect of adverse costs orders in constitutional and rights-based litigation and therefore developed a protective costs approach to guard against it.

In *Biowatch Trust v Registrar Genetic Resources & Others* (2009), the Constitutional Court emphatically affirmed the principle that an unsuccessful litigant in constitutional litigation (typically against the state) ought not to be ordered to pay costs unless the claim was frivolous, vexatious or involved conduct deserving of censure.[2] Where the respondent is unsuccessful, it should be required to pay the applicant's costs.[3] This model has been enshrined in South African common law for fifteen years and operates on the same principles as the equal access costs model. The affirmation of this protective costs model, which can benefit both individual and corporate applicants, has not produced a spate of baseless constitutional litigation.[4]

The application of this model in South African constitutional challenges is directly analogous to its application to the Australian anti-discrimination regime. The South African constitutional right to equality includes the right not to be discriminated

---

[1] Law Council of Australia, Submission 33 to the Senate Legal and Constitutional Affairs Committee's inquiry into the Human Rights Commission Amendment (Costs Protection) Bill 2023, [87].
[2] *Biowatch Trust v Registrar Genetic Resources & Others* [2009] ZACC 14, [22], [261].
[3] Ibid, [22].
[4] Steven Budlender, Gilbert Marcus SC and Nick Ferreira, *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (2014), 136.

against on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. These rights are adjudicated in South Africa under its constitutionally enshrined Bill of Rights, the beneficial purpose of which is very similar to that of federal discrimination legislation in Australia.[5]

**United States**

In its written submission to this inquiry, the Law Council of Australia suggested that a 'no costs' regime applied to most discrimination litigation in the US.[6]

However, in *Christiansburg Garment Co v Equal Employment Opportunity Commission* (1978), the US Supreme Court replaced the default 'no costs' rule with a costs principle closely resembling an equal access model in employment discrimination matters. In *Christiansburg Garment Co*, the Supreme Court held that a successful applicant in employment discrimination matters will generally be awarded costs (this presumption is also enshrined in legislation)[7] and that an unsuccessful applicant should not be ordered to pay the respondent's costs unless the applicant's claim is frivolous, unreasonable or without foundation.[8]

Notably, the Supreme Court's decision applies to all matters brought under Title VII of the *Civil Rights Act 1964*, which prohibits discrimination on the basis of 'race, colo[u]r, religion, sex and national origin' within various employment contexts. The application of an equal access costs model to discrimination claims arising across a variety of protected attributes has therefore been in place in the US for over 40 years.

In *Christiansburg Garment Co*, the Supreme Court concluded that awarding costs against an unsuccessful applicant 'would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII'.[9] In other decisions, the Supreme Court has noted that applicants in employment discrimination cases are 'the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority'.[10] A similar dynamic exists in the Australian

---

[5] Constitution of the Republic of South Africa 1996, Chapter 2: Bill of Rights, s 9.
[6] Above n 1.
[7] Code of Federal Regulations (US) 29 C.F.R. § 1614.501(e)(1)(i).
[8] *Christiansburg Garment Co v Equal Employment Opportunity Commission*, 434 U.S. 412 (1978) 415-422.
[9] Ibid, 422.
[10] *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) 402.

anti-discrimination system, where victim-survivors bear the burden of enforcing and upholding the standards of conduct set by Parliament, for the benefit of the general public.

Since *Christiansburg Garment Co*, this protective costs model has also been applied by US state district courts in other civil rights and public interest cases.[11] In some state jurisdictions, including California, the default US 'no costs' rule has also been varied by legislation that empowers courts in certain circumstances to award costs to a litigant who has successfully enforced 'an important right affecting public interest'.[12] These US costs models have similar effects to those envisioned by the modified equal access model proposed in the Bill.

**United Kingdom**

In the UK, a 'qualified one-way costs shifting' model has applied in personal injury claims since 2013. Under this model, successful claimants can seek to recover their costs when successful but will generally not be liable for the defendant's costs if wholly unsuccessful, except in limited circumstances.[13]

Similar provisions were also introduced in Scotland in 2021.[14]

**European Union**

In March 2023, the European Parliament and Council of the European Union passed Directive (EU) 2023/970 to strengthen the application of the principle of equal pay between men and women through pay transparency and enforcement mechanisms. Article 22 of the Directive requires all EU member states to legislate costs protections ensuring that, if an applicant in a litigated pay discrimination claim is unsuccessful but had reasonable grounds for bringing the claim, the applicant should not automatically be required to pay the respondent's costs. The Directive must be implemented by member states into their national laws by 2026.

The effect of this costs protection is similar to the principles of an equal access model. The Directive relevantly notes, 'litigation costs create a serious disincentive for

---

[11] See e.g. *Williams v Chino Valley Independent Fire District* (2015) No. S213100 (Cal. May 14, 2015); *Sierra Club v Energy Future Holdings Corp*, No. 6:12-cv-108 (W.D. Tex. Aug. 29, 2014).
[12] *Code of Civil Procedure* (California) § 1021.5.
[13] *Civil Procedure Rules* (UK) r 44.13-44.17.
[14] *Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018* s 8.

victims of gender-based pay discrimination to bring claims regarding alleged infringements of their right to equal pay, leading to the insufficient protection of workers and the insufficient enforcement of the right to equal pay'.[15]

**Implications for costs reform in Australia**

As demonstrated by the international examples above, equal access costs principles can be used to effectively and fairly level the playing field in litigation that serves the public interest. Such overseas models provide helpful indicators of what is possible and workable, but should by no means limit the scope of Parliament's consideration of what might be appropriate in an Australian context.

While Australia has fallen out of step with many overseas jurisdictions when it comes to costs protection for victim-survivors of discrimination and harassment, the introduction of a modified equal access model across federal discrimination matters currently being considered by Parliament offers a unique opportunity to implement global best practice and lead the way for a fairer, more inclusive society. To this end, we strongly support the passage of the Bill.

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

Yours sincerely

Isabelle Reinecke
Executive Director
Grata Fund

Courtney Law
Senior Solicitor (Strategic Litigation)
Grata Fund

[15] Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, PE/81/2022/REV/1, [54].

Ellen Tilbury
Principal Solicitor
Public Interest Advocacy Centre

Mitchell Skipsey
Senior Solicitor (Strategic Litigation)
Public Interest Advocacy Centre