

5 February 2024

Legal and Constitutional Affairs Legislation
Committee
PO Box 6100,
Parliament House
Canberra ACT 2600

BY E-MAIL: LegCon.Sen@aph.gov.au

Dear Sir/Madam,

AHRC AMENDMENT (COSTS PROTECTION) BILL 2023 – QUESTIONS ON NOTICE

1. HRLA recently appeared at the Senate hearing regarding the AHRC's proposed Amendment to the Costs Protection Bill (**Costs Protection Bill**). We refer to the question on notice from Senator Scarr concerning the 'broad discretion' approach proposed by the Law Council of Australia (**Law Council**). We provide our response to Senator's Scarr's question below. For more information on HRLA's position, please refer to the HRLA and ACL submissions.
2. HRLA considers that the proposed amendments to the Costs Protection Bill are disproportionate and stray extensively beyond the concerns raised by the Respect@Work report regarding sexual harassment in the workplace. The Law Council, likewise, has raised its significant concerns with the unintended and arbitrary outcomes that may result from the proposed amendment. The Law Council has proposed a 'broad discretion' approach as an alternative to the AHRC's 'equality model'.

Question on Notice – HRLA's position on the Law Council's proposed '*broad discretion*' alternative

3. HRLA shares the Law Council's concerns about the potential for the proposed Bill to:¹
 - 3.1. undermine the courts' discretion to award costs in the interests of justice; and
 - 3.2. interfere with the efficient management of cases and pre-litigation settlements
 - 3.3. encourage large numbers of applicants to commence unmeritorious and protracted litigation without sufficient incentives to ensure efficiency within the justice system
 - 3.4. disincentivise applicants from genuinely engaging with the AHRC's conciliation processes and any subsequent alternative dispute processes
 - 3.5. inappropriately subject respondents who are not at fault, to the burden and costs associated with defending unmeritorious claims, and
 - 3.6. displace long-established precedent surrounding the rationale of costs orders and the role of costs in effecting fair and just outcomes.

¹ Law Council of Australia Submission at [7]-[12], [63].

4. HRLA considers the Law Council’s ‘broad discretion’ approach to be a marked improvement from the current proposal, which would result in a strict a-symmetrical costs regime with unintended consequences and a propensity for unjust outcomes.
5. The ‘broad discretion’ approach would provide guidance to courts on factors to consider in exercising their discretion concerning costs, whilst also maintaining their ability to tailor any costs orders to achieve fair and just outcomes. Conversely, the AHRC’s proposed regime would prevent courts from making different costs awards in the interests of justice.
6. The Bill would encourage applicants to bring vexatious and unmeritorious complaints. It would undermine the efficacy of alternative dispute resolution processes (including AHRC conciliations). In this context, HRLA considers the Law Council’s ‘broad discretion’ approach to be a significant step forwards with respect to the current proposal for reform to Australia’s federal costs regime.
7. In its current form, HRLA cannot support the Costs Protection Bill. HRLA would be less inclined to oppose the Bill in its entirety if amendments were made to reflect the approach proposed by the Law Council.

Yours sincerely,

John Steenhof
Principal Lawyer