AUSTRALIAN CATHOLIC BISHOPS CONFERENCE
Bishops Commission for Life, Family and Public Engagement

4 January 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600
legcon.sen@aph.gov.au

Dear Sir/Madam

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

This submission from the Australian Catholic Bishops Conference (**the Conference**), as prepared by the Bishops Commission for Life, Family and Public Engagement (**the Commission**), is made to contribute to this inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (**the Bill**).

One in five Australians identify as Catholic. The Catholic Church and its agencies contribute in various ways across the spectrum of Australian society. As an integral part of its core mission, the Church seeks to assist people to experience the fullness of life. It is concerned with all that impacts on human dignity and wellbeing for the common good.

The Australian Catholic Bishops Conference is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The Commission is one of several commissions and agencies established by the Conference, including the National Catholic Education Commission, to address important issues both within the Church and in the broader Australian community. The Commission has responsibility for commenting on human rights law and particularly religious freedom.

The Conference seeks to participate in public debate by making reasoned arguments that can be considered by all people of goodwill.

The Catholic Church is committed to human rights and protecting people who are vulnerable and disadvantaged. All human rights are informed by the dignity of the human person and the universal demand for justice.

The Conference appreciates the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee on the Bill.

Executive Summary

The following summarises the key contentions made in this submission:

1. the ‘equal access’ model in the Bill is inappropriate for discrimination litigation;

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2. the Bill has been drafted with a focus on discrimination in the workplace, without due regard for how the 'equal access' model will be applied in other contexts;
3. the Bill does not provide adequate safeguards for respondents as claimed;
4. by removing the Court's ability to take into account the full range of actions and the circumstances of the parties, the Bill fetters the Court's discretion to make costs determinations in the proper interests of justice, entailing the prospect of unjust outcomes;
5. the Bill unfairly burdens respondents with the cost of defending against unmeritorious discrimination claims; and
6. the Bill risks encouraging a more litigious society.

Recommendations

The Australian Catholic Bishops Conference recommends that the Government withdraw the Bill.

Submissions

The Bill goes far beyond the recommendations of the Respect@Work Report

Recommendation 25 of the Respect@Work Report reads: "Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the Fair Work Act 2009 (Cth)."

Contrary to recommendation 25, the Bill's proposed amendment to the Australian Human Rights Commission Act is inconsistent with section 570 because it treats applicants and respondents unequally by forcing a court to make a costs order against a respondent unless the respondent is successful on every single ground before the court or otherwise in the strictly limited circumstances where the applicant instituted the proceedings vexatiously or without reasonable cause or the applicant's unreasonable act or omission caused the other party to incur the costs. Such a requirement is not present in section 570.

The 'Equal Access' Model is Inappropriate for Discrimination Litigation

In 2022, the Senate Legal and Constitutional Affairs Legislation Committee reported that the 'equal access' model proposed in the Bill drew inspiration from the whistleblower protection and public interest disclosure cost-protection provisions in section 1317AH of the Corporations Act 2001 (Cth) and section 18 of the Public Interest Disclosure Act 2013 (Cth) respectively. The policy rationales grounding the application of a costs-protection model that addresses the unique obstacles faced by whistleblowers in the interests of justice are simply inapplicable to the circumstances of the parties to litigation in civil discrimination law.

Respondents in discrimination litigation are incredibly varied and include private individuals of different means, small businesses, charities, churches, schools, and community organisations. It is an error to assume, as the Bill does, that respondents will typically be well-resourced. It is similarly erroneous to assume that an applicant will not have adequate funding to pursue a claim, particularly with the recommendation that representative actions be permitted. The Conference submits that these misplaced assumptions render the Bill fatally flawed, and unfairly impose the cost of defending unmeritorious discrimination claims upon respondents. For charities,

churches, schools, and community organisations, every dollar spent defending unmeritorious discrimination claims that cannot be recovered is a dollar that cannot be spent on serving the community.

The Implications of the 'Equal Access' Model have not been Considered for Contexts other than Employment

The Conference notes that while the Explanatory Memorandum states (at paragraph 11) that the 'Respect@Work Report has been certified by the Attorney-General's Department as meeting the requirements of a Regulatory Impact Statement', that Inquiry's terms of reference centred on 'workplace sexual harassment'. It does not appear that the impact of the Bill has been considered in any context outside of employment, nor does it appear that the possible implications of the Bill on the operations of charities, churches, schools, and community organisations have been considered.

The Bill does not Provide Adequate Safeguards

The Conference submits that the Bill does not provide adequate safeguards to ensure that charities, churches, schools, and community organisations are not unfairly burdened with the cost of defending unmeritorious discrimination claims. The Explanatory Memorandum for the Bill states:

> "The equal access model in this Bill would address these power imbalances and resource disparities, which are present in most unlawful discrimination proceedings. However, the equal access model has been modified to reduce the burden on respondents who are successful on all grounds and are not well-resourced or at a significant power advantage relative to the applicant, such as some individuals or small businesses."

The Conference considers that the requirement to succeed on all grounds imposes an excessively high bar for respondents to access the safeguards the Bill purports to implement. Further, the requirement that a respondent demonstrate that they have no significant 'power imbalance' again discloses that the drafting of this Bill has not had due regard to any context outside of employment. The meaning of 'power imbalance' may (or may not) be readily apparent in the context of employment. However, it is unclear what, if any, application these words are intended to have outside of the context of employment.

For example, it is unclear how a charity, school, church, or community organisation could demonstrate that there is no significant 'power imbalance' in the context of the provision of services. This could preclude a court from issuing a costs order in accordance with the proper interests of justice. The Explanatory Memorandum is devoid of guidance as to the intended application of this provision in any context outside of employment.

A further difficulty in application of the Bill arises with the relativistic 'resources test', which makes the ability of a respondent to recover costs contingent upon their financial position relative to the applicant. It is easy to foresee a scenario in which a respondent such as a charity, school, church, or community organisation is not well-resourced in an objective sense (i.e. relative to the cost of litigation) but is nonetheless unable to recover costs because their resources are considered 'significant' relative to an applicant.

This inherent relativism means that respondents defending unmeritorious claims will in some sense have their ability to recover costs determined by whether the applicant in a particular case happens to be relatively wealthy or not. In certain circumstances the positing of this factor as an overriding consideration may operate against the interests of justice. There is therefore a real risk that this Bill will disproportionately and negatively impact the operations of charities, schools, churches, and community organisations which, in acquitting their public-benefitting purposes, routinely provide services to people on lower incomes. Again, this discloses a lack of consideration as to the potential implications of this Bill for the operations of charities, schools, churches, and community organisations.

The Conference considers that the Bill is fraught with drafting ambiguities. Its novel propositions are highly imprecise and uncertain in application. Contrary to the claims made in the Explanatory Memorandum,[1] the Bill provides no safeguard by which a successful respondent can be confident that they will be able to recover the costs of defending against an unmeritorious claim and provides no real disincentive against applicants making unmeritorious claims speculatively.

The Bill Subverts the Principles on Which Costs have Traditionally been Awarded

The Bill removes the existing discretion of the Federal Court to award costs in the interests of ensuring justice between the parties pursuant to section 43 of the Federal Court of Australia Act 1976 (Cth). This section operates against the backdrop of the long-standing common law principles that have been developed to ensure that the interests of the parties are duly regarded in any determination. The Bill disturbs these principles, fettering the Court's ability to award costs in the interests of justice, having regard to the full circumstances and actions of the parties. The limitation the Bill proposes to impose upon the considerations that a Court may have regard to could foreseeably lead to unjust outcomes. This is particularly the case to the extent that certain considerations operate as overriding factors that would negate any other compelling consideration. The Bill loses sight of the basic principle that underlies the conventional approach to costs orders, as articulated by Brennan CJ in Oshlack v Richmond River Council: 'Costs are awarded to indemnify a successful party in litigation, not by way of punishment of an unsuccessful party.'[2] It is unjust to impose upon a party the cost of defending a largely unmeritorious claim that it did not initiate.

The Bill Risks Making Australia a More Litigious Society

The Conference notes that the Bill also removes the existing discretion of the Federal Court in section 46PSA of the Australian Human Rights Commission Act 1986 (Cth) to consider whether an offer of settlement has been refused in deciding whether to award costs. The Explanatory Memorandum makes it clear that the replacement section 46PSA is not intended to confer the same discretion:

> "This is intended to be a high threshold and reserved for rare cases. For example, a mere refusal of a settlement offer, refusal to participate in a conciliation, the running of novel arguments or a self-represented litigant's lack of legal expertise are not intended to amount to an unreasonable act or omission."[3]

The Conference submits that the removal of this discretion significantly reduces the incentive to settle matters out of court, and to engage in alternative dispute resolution. This further removes any disincentive against the pursuit of highly speculative and unmeritorious claims. The Conference submits that this Bill risks creating a more litigious society, which would be detrimental to the common good.

Conclusion

The Conference reiterates the Church's stance on the necessity to combat unlawful discrimination. Catholic teaching on this point is clear:

[1] Australian Human Rights Commission Amendment (Costs Protection) Bill 2023, Explanatory Memorandum, 2023 Bill [7] ('the Bill').
[2] (1998) 193 CLR 72 [1].
[3] Explanatory Memorandum, Bill [13].

> "But any kind of social or cultural discrimination in basic personal rights on the grounds of sex, race, colour, social conditions, language or religion, must be curbed and eradicated as incompatible with God's design."[4]

However, the Conference submits that how this is achieved matters; it is ethically unsound to impose an injustice in the pursuit of justice. The Bill fetters the Court's discretion to balance the interests of the parties in accordance with the interests of justice and with regard to their particular circumstances and actions in accordance with the long-standing common law principles. The Bill thus contemplates unjust outcomes. It is unjust to incentivise the making of unmeritorious complaints. It is unjust to impose upon charities, churches, schools, and community organisations the cost of defending unmeritorious discrimination claims. It is detrimental to the common good to make laws that encourage movement towards a more litigious society by removing any disincentive against pursuing speculative and unmeritorious claims. For these reasons, the Conference urges the Government to withdraw the Bill.

The Chair of the Commission, Archbishop Peter A Comensoli, is on holiday leave but would be happy to answer any questions the Committee may have on his return. The Chair can be contacted via Mr Jeremy Stuparich, Deputy General Secretary at the Conference

Yours faithfully

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[4] Gaudium et Spes ("The Church in the Modern World"), Vatican II, 1965, #29.