



Australia



Joint Submission

Senate Legal and Constitutional Affairs Committee

Inquiry into the *Australian Human Rights Commission
Amendment (Costs Protection) Bill 2023*

For further information in relation to this submission:

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Introduction

Christian Schools Australia (CSA) is a national body that supports and represents schools for whom religious formation is an integral part of the education process. CSA schools educate more than 75,000 students across around 180 locations nationally.

The Australian Association of Christian Schools (AACS) represents over a hundred Christian Schools located in every state and territory across the country, educating over 44,000 students. The majority of AACS schools are open enrolment, serving families from a variety of socio-economic, cultural and religious backgrounds.

Adventist Schools Australia (ASA) are part of the largest protestant schooling system in the world with 9,489 schools, colleges and universities in over 100 countries, educating 2,044,709 students. Within Australia, ASA has 48 schools and 13 early learning services providing authentic Christian education to nearly 17,000 students.

Member schools of both CSA and AACS operate as independent, locally governed, religious organisations. Some are closely aligned with one or more Christian churches in their communities, while others have their heritage in a group of parents coming together to start a school. ASA schools operate systemically through a range of small systems aligned with church governance requirements.

Background to the Bill

The *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* ('the Bill') notionally has its origins in the *Respect@Work: Sexual Harassment National Inquiry Report 2020*. This inquiry, which was launched in 2018 and reported 'on in 2020, focussed on workplace sexual harassment. As one of its recommendations it proposed as follows:

Recommendation 25:

"Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009*"

Christian Schools have both a strong record of dealing with sexual harassment in their workplaces and some research indicates a notably lower number of sexual harassment instances. The 2018 CSA report into Sexual Harassment in Christian Schools finding, for example, that on average only 1 in 22 CSA staff had experienced sexual harassment compared to the national average of 1 in 5 reported by the Australian Human Rights Commission's "Everyone's Business" report released at that time.

Of course, any sexual harassment cannot be tolerated, and the organisations making this submission and the schools they represent are committed to eliminating sexual harassment. As part of a holistic response to the issue, Christian schools were **supportive of the implementation of the proposal laid out in recommendation 25**.

The Government in seeking to respond to the *Respect@Work: Sexual Harassment National Inquiry Report 2020* included a 'costs neutral' amendment to Australian Human Rights Commission Act in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* as originally introduced. This was considered, along with an 'equal access' approach by the Senate Legal

and Constitutional Affairs Committee. In its report on this inquiry, the Committee noted that the Attorney General’s Department “resisted calls for the Bill to adopt an ‘equal access’ approach to costs protection reform on the basis that the ‘cost neutrality’ approach is fairer to applicants and respondents”, with the Law Council agreeing that “the ‘equal access’ approach favours applicants/plaintiffs”.¹ The costs protection provisions were subsequently dropped from this bill.

The proposed approach in the Bill varies significantly from both that outlined in recommendation 25 and the approach in *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* as originally introduced. Instead, it adopts a form of an ‘equal access’ approach roundly criticised in the earlier Committee inquiry.

Concerns Regarding the Bill

Scope of Application of the Changes

As indicated above, the *Respect@Work: Sexual Harassment National Inquiry Report 2020* focussed on workplace sexual harassment. Recommendation 25, accordingly, was in response to ‘the risk of cost orders acting as a disincentive to pursuing sexual harassment matters in the federal jurisdiction’.² It was in this context, after considering all the relevant submissions, that the Commission recommended the insertion of a costs protection provision.

The impact of the Bill, however, goes far beyond the scope of the report, sexual harassment, and even beyond the alleged discrimination on the basis of sex. The costs protections regime outlined in the Bill would apply to proceedings alleging **discrimination on any ground** prohibited by Commonwealth legislation. The impact is not contained to proceedings instigated under the *Sex Discrimination Act 1984* (Cth) but to all Commonwealth discrimination legislation, including any future religious discrimination legislation.

On this basis alone **it is incorrect to claim that the Bill reflects the recommendation of the *Respect@Work: Sexual Harassment National Inquiry Report 2020***. The Bill has a much more expansive scope of application, far beyond that considered in the inquiry process.

Inconsistency with Recommended Approach

Recommendation 25 was to amend the Australian Human Rights Commission Act to “insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009*”. That section of the Fair Work Act 2009 limits the ability of costs to be awarded by the Courts against a party to only when subsection 570(2) applies or when costs are ordered against a government under section 569 or 569A.

(2) *The party may be ordered to pay the costs only if:*

(a) *the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or*

¹ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]* (2022) [2.103- 2.104].

² Australian Human Rights Commission & Jenkins, Kate. (2020). *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces / Australian Human Rights Commission*. Sydney, NSW : Australian Human Rights Commission https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020?mc_cid=1065707e3c&mc_eid=%5bUNIQID%5d&_ga=2.100661976.713284818.1600054366-1100274974.1584490855, page 589.

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

These are relatively limited circumstances and require deliberate actions, instituting proceeding vexatiously or acting unreasonably, by the party which will bear costs. This provision **allows** the court to order costs, but does not **mandate** it to do so.

In stark contrast, the Bill proposes a regime which:

- **Requires** the courts to award costs against the respondent if the applicant is successful on **any** ground except to the extent that the applicant's unreasonable act caused the applicant to incur costs.
- **Only allows** the courts to award costs against the applicant if the applicant instituted proceeding vexatiously or acting unreasonably and the respondent:
 - was successful in the proceedings; **and**
 - does not have "a significant power advantage over the applicant"; **and**
 - does not have "significant financial or other resources relative to the applicant".

The Bill also applies this regime to representative complaints, which are not a feature of the *Fair Work Act 2009*.

Both the Explanatory Memorandum and Attorney-General's speech introducing the Bill recognise that the approach taken varies from the original recommendation. Neither provide any rationale or justification for the changed approach beyond a comment that it occurred after, 'careful consideration and close and comprehensive consultation with a range of organisations and individuals', none of whom are specifically identified, in the Attorney-General's speech.³

The abandonment of the scheme recommended by the original inquiry, or the approach in *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*, without any clear explanation or rationale is perplexing. The lack of widespread public consultation on such a significant proposal is also concerning.

Impact of the Bill

On the basis of the preliminary advice we have received, only in highly exceptional circumstances could costs be ordered against a person initiating discrimination proceedings, and even then, it would be on a discretionary basis. This advice suggests that it would become virtually cost and risk free for an individual, or an activist body on their behalf, to commence a discrimination action against Christian schools, because, as relative to an individual, schools will almost always have "significant financial or other resources relative to the applicant".

³ Commonwealth, *Parliamentary Debates- Proof*, House of Representatives, 15 November 2023, 12 (Mark Dreyfus, Attorney-General)

Moreover, the respondent school must pay the costs of the person alleging discrimination if **any** one ground of alleged discrimination, even a relatively minor one, succeeds, even though scores of grounds may have failed because they have been successfully defended.

The regime proposed by the Bill is better described as a 'un-equal access' approach rather than an 'equal access' scheme, provided clearly different approaches to imposing costs on applicants and respondents. This outcome is excessively one-sided, and prescriptive, when the courts discretion should instead be applied, on traditional grounds, subject to protections as originally proposed, namely those in section 570 of the *Fair Work Act 2009*.

The unbalanced nature of the proposals is an invitation for activist and punitive litigation, with low prospects of success but having the aim merely to generate media attention and create inconvenience to schools. These concerns will be amplified should the Government remove existing exemptions in the *Sex Discrimination Act 1984* as is currently being considered.

Discussions with insurance providers has also confirmed that the arrangements in the Bill are likely to result in increased premiums, possibly proactively, as a result of the potential for greater claim payments.

Recommendations

Consistent with the strong commitment of Christian schools to address sexual harassment, we want to make certain that there is a sustainable and balanced means of ensuring that those making a sexual harassment complaint are not precluded from doing so as a result of concerns regarding legal costs. For this reason, we are supportive of the recommendations in the *Respect@Work: Sexual Harassment National Inquiry Report 2020*. The proposals in the Bill, however, go well beyond this and introduce an unjust and inequitable approach to the issue of legal costs.

As an alternative, we recommend that the Government revert to the approach arising from the extensive work undertaken in preparing the *Respect@Work: Sexual Harassment National Inquiry Report 2020* and:

- Amend the *Australian Human Rights Commission Act 1986* to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* as originally recommended, and
- Ensure that the cost protection provision applies only to claims of sexual harassment.