CHAPTER 6

COMPLAINTS AND COURT PROCESSES

6.1 The committee received a significant volume of evidence on clause 124 of the Draft Bill, which would introduce a shifting burden of proof for proceedings alleging unlawful conduct before the Federal Court of Australia (Federal Court) or the Federal Magistrates Court. Stakeholders also provided extensive submissions in relation to new costs provisions in clause 133, which introduces a default position that parties should bear their own costs for litigation for unlawful conduct.

6.2 In addition, there was also considerable commentary by stakeholders on:

- clause 122, which deals with standing to make an application to the Federal Court or Federal Magistrates Court; and
- the provisions in clause 117 which enable the Australian Human Rights Commission (AHRC) to dismiss unmeritorious complaints.

Shifting burden of proof

6.3 As a result of the changes proposed in clause 124, an applicant in proceedings before the Federal Court or Federal Magistrates Court alleging unlawful conduct will be required to first establish a prima facie case that unlawful discrimination occurred. Once that prima facie case has been established, the burden will shift to the respondent to demonstrate a non-discriminatory reason for the conduct, that conduct in question was justifiable or that another exception applies.[1]

6.4 The Department emphasised that the change proposed is not a significant departure from the existing burden of proof requirements:

> This proposed shifting burden of proof reflects a change from only one element of unlawful discrimination claims under the current anti-discrimination law regime: the reason or purpose why a person engaged in the conduct…This burden only shifts once the complainant has first established a *prima facie* case.[2]

6.5 Although the Department identified that the proposed changes do not represent a significant departure from the existing burden of proof requirements, a number of stakeholders raised concerns in relation to the introduction of a shifting burden of proof. For example, Master Builders Australia contended that the changes

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1 EN, p. 89.

2 *Submission 130*, p. 2.

would increase both the regulatory burden for employers and the occurrence of vexatious claims.[3]

Support for the proposal

6.6 The concerns raised by these stakeholders were not shared by others.[4] For example, the Discrimination Law Experts Group argued:

> The applicant's obligation to adduce probative evidence is a genuine burden which will deter frivolous claims. The shifting onus will operate so as not to exclude claims that cannot be proven for want of evidence that is known only to the respondent, and at the same time will enable the respondent to volunteer what only they know: the reason for their conduct.[5]

6.7 Professor Simon Rice OAM, representing the Discrimination Law Experts Group at the Sydney hearing, pointed out that the approach of clause 124 is 'unremarkable' and consistent with international practice:

> [T]he proposition that the person who acts is the best person to tell you why they acted is in my experience a very sound proposition. On being satisfied of a prima facie case, to then turn to the person against whom the allegation is made and say, 'Explain why you did it,' in my experience makes sense in the shifting burden of proof…[B]orrowing from industrial law simply goes down that path and we do not think it is accurate or constructive to refer to it as a presumption of guilt as some commentators have done.[6]

6.8 Mr Nicholas Cowdery QC from the Law Council of Australia echoed these views and contended that the arguments being made in relation to the proposed shifting burden of proof are 'alarmist':

> If this were a proposal in relation to a criminal statute then we would probably have a different view about things. But there is well-established practice in this area of shifting burdens of proof…[T]he person who conducts themselves in a particular way is in the best position to explain

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3 Master Builders Australia, *Submission 353*, p. 27. See also: Mr Daniel Mammone, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 January 2013, pp 14-15; Civil Contractors Federations, *Submission 307*, pp 15-16; Chartered Secretaries Australia, *Submission 321*, pp 3-4; Institute of Public Affairs, *Submission 331*, pp 9-10; The Hon Diana Bryant AO, Chief Justice, Family Court of Australia, *Submission 345*, pp 6-7; Australian Catholic Bishops Conference, *Submission 360*, pp 7-8; Freedom 4 Faith, *Submission 447*, pp 14-16.

4 See, for example, Ms Anne Hewitt, Professor Andrew Stewart, Professor Rosemary Owens, Ms Gabrielle Appleby and Ms Beth Nosworthy, University of Adelaide Law School, *Submission 204*, p. 7; National Aboriginal and Torres Strait Islander Legal Services, *Submission 255*, p. 15; Australian Council of Trade Unions, *Submission 310*, pp 12-13; National Association of Community Legal Centres and Kingsford Legal Centre, *Submission 334*, p. 14; Australian Council of Human Rights Agencies, *Submission 358*, p. 17; Human Rights Law Centre, *Submission 402*, pp 13-17; Australian Centre for Disability Law, *Submission 556*, pp 1-2.

5 *Submission 207*, p. 31.

6 *Committee Hansard*, 24 January 2013, p. 50.

> why that was done. It is quite an unexceptional provision that is being proposed.[7]

6.9 Professor Gillian Triggs, President of the AHRC, explained that the proposed shifting of the burden of proof does not result in the 'key persuasive burden lying with the person against whom the complaint is made':

> When somebody uses the phrase 'reversing the burden of proof' the implication is that they have to prove the essential ingredients or *actus reus* of a crime, or the essential ingredients of…the particular cause of action… Here…there appears to be an intended shift in the burden once certain elements of proof have been established, so that, at minimum, some prima facie evidence must be adduced…that the act occurred and that, without any other explanation, the reason for that act was for a prohibited purpose.[8]

6.10 In the context of the current AHRC complaints process, Professor Triggs submitted that, after an initial and substantial 'level of evidence' is produced, it is 'entirely appropriate' that an employer be asked to provide evidence to defend their actions:

> Quite substantial matters must be determined, and it will obviously depend upon the particular complaint and the particular circumstances…You have got to produce a very significant level of evidence before the [AHRC] to demonstrate these facts. In order to determine what is in the mind of the employer in making that decision, it is entirely appropriate that that employer would have evidence to show: 'On the face of it, it doesn't look very good, but in reality we can adduce other evidence that suggests [that we] had an extremely good reason and the person actually had particular attributes in terms of skills that we wanted'.[9]

Departmental response

6.11 In response to the debate concerning the shifting burden of proof, the Secretary of the Department advised the committee:

> As a preliminary point the draft bill only imposes civil and not criminal liability. Statements that the draft bill removes the presumption of innocence, which only apply to the criminal rather than the civil context, are probably a little misleading. It should also be clarified that the burden only shifts in relation to establishing the reason for the conduct. It is not correct to say that a person must prove a negative or prove that something did not happen. The burden will not shift until [an applicant] has established that unlawful treatment actually occurred and that he or she has a relevant attribute.[10]

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7 *Committee Hansard*, 24 January 2013, p. 59.

8 *Committee Hansard*, 24 January 2013, p. 71.

9 *Committee Hansard*, 24 January 2013, p. 71.

10 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 3.

Costs in cases brought before the courts

6.12 The Draft Bill introduces a change in policy in relation to costs. Clause 133 provides for a default position where each party will bear their own costs in proceedings in the Federal Court or the Federal Magistrates Court.[11]

6.13 The Explanatory Notes explain that the risk of an adverse costs order is a 'significant barrier to commencing litigation, even for cases with relative merit'.[12]

6.14 The committee received evidence suggesting that the change to costs introduced by clause 133 would improve access to justice.

6.15 For example, the National Association of Community Legal Centres (NACLC) and Kingsford Legal Centre (KLC) stated that they welcomed the change:

> As a result of the risk of an adverse costs order, many complainants are reluctant to even lodge complaints at the AHRC, preferring state-based tribunals where parties bear their own costs. Where matters are contested at a federal level, NACLC and KLC's experience is that most cases settle – even very strong discrimination complaints.[13]

6.16 At the public hearing in Sydney, Associate Professor Anna Cody representing the NACLC stated:

> We also welcome that, generally in the proposed draft, each party should bear their own costs and recommend that [applicants], who are generally more disadvantaged, should only have costs awarded against them for frivolous, vexatious complaints or those lacking in substance.[14]

6.17 Mr Edward Santow from the Public Interest Advocacy Centre (PIAC) conveyed PIAC's support for the proposed costs provisions on the basis of the benefits it will have in terms of access to justice:

> We have found that the risk of an adverse costs order has discouraged a number of our clients who have a strong case from pursuing and vindicating their right not to be discriminated against. Fundamentally, there is not a lot of money at stake if [an applicant] wins a discrimination case in court – and, frankly, nor should there be. But when [an applicant] is up against a much more wealthy opponent, the risk that they face in bringing their case can be far too great. Making this a no-costs jurisdiction also brings this area into line with, again, the Fair Work Act and some state and territory laws.[15]

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11 EN, p. 94.

12 EN, p. 94.

13 *Submission 334*, p. 15.

14 *Committee Hansard*, 24 January 2013, p. 9.

15 *Committee Hansard*, 24 January 2013, p. 10.

6.18 Although many submitters were generally supportive of the changes to costs orders that will be introduced by clause 133,[16] not all submitters shared this view.

6.19 Maurice Blackburn Lawyers argued that the move to a 'no-costs' jurisdiction would in fact reduce access to justice for the following reasons:

- as damages in these claims are traditionally low, claims would be uneconomic for applicants who risk being out of pocket even if successful;
- discrimination claims generally involve a comparative power imbalance and the applicant often has less power than the respondent. In this situation, the applicant may face costs of self-representation and even in the event of success may be left out of pocket; and
- orders for costs enable law firms and barristers who pursue complaints on a pro-bono basis to recover at least some of their costs.[17]

6.20 The Australian Institute of Company Directors also opposed the changes to costs:

> The introduction of a 'no-costs' jurisdiction will substantially increase the legal costs that a successful respondent will bear in defending its lawful conduct. This is likely to cause particular difficulties for smaller businesses and not-for-profit organisations.[18]

Departmental response

6.21 The Department commented on the issues raised in relation to costs, advising that clause 133 responds to concerns raised during the consultation process that many applicants are reluctant to pursue genuine claims of discrimination because of the risk of an adverse costs order if they are unsuccessful.[19]

6.22 The Department submitted that strengthening the ability of the AHRC to close vexatious or unmeritorious complaints would also help to address concerns that have been raised by some stakeholders in relation to costs:

> Some submissions [to the current inquiry] argue that changes to the current costs or standing arrangements could lead to an increase in complaints without merit…[T]he Bill will strengthen the [AHRC's] powers to close unmeritorious complaints, and require leave of the Court to proceed where a complaint has been closed on that basis.[20]

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16 See, for example, Australian Lawyers for Human Rights, *Submission 406*, pp 2-3; Australian Industry Group, *Submission 415*, p. 19; Public Interest Advocacy Centre, *Submission 421*, p. 50; Public Interest Law Clearing House, *Submission 425*, p. 9; Ms Anna Brown, Human Rights Law Centre, *Committee Hansard*, 23 January 2013, p. 56.

17 *Submission 374*, pp 4-7.

18 *Submission 361*, p. 3.

19 *Supplementary Submission 130*, p. 17.

20 *Supplementary Submission 130*, p. 17.

Standing to apply to the Federal Court of the Federal Magistrates Court

6.23 Clause 122 provides that a person making an application to the Federal Court or the Federal Magistrates Court alleging unlawful conduct, must be 'an affected party in relation to the complaint'.

6.24 Some submitters were critical of this requirement that applications to the Federal Court and Federal Magistrates Court must be made by the affected party. Criticisms were made on the basis that, in many circumstances, the affected party may not have the means or ability to pursue their claim without assistance from a representative. For example, Ms Julie Phillips from the Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service explained the important role that representative actions would play in enabling those who have disabilities to successfully pursue claims of discrimination:

> We particularly support an organisation being able to do these things on behalf of people with disabilities…There are a whole lot of reasons why some people with disabilities are not equipped in many ways to run these sorts of complaints. One that comes to mind is somebody who is unwell with a mental illness. The stress and strain and the behaviour of some respondents are significant. It really is a huge burden that goes on sometimes for a number of years. It is obviously going to benefit people with disabilities and allow them to use the law, which they may not have felt they can use themselves, if an organisation can act on their behalf. If there is a systemic problem in relation to policies that are discriminatory or practices that are affecting a lot of people, to be honest, it just makes sense, for a number of reasons, for a group to be able to run one case rather than have to rely on 20 people to run a case—economically as well.[21]

6.25 Ms Hall from the Australian Federation of Disability Organisations noted that, in her view, individual claims which are settled have no effect in preventing discriminatory practices from continuing:

> There are numerous cases, for example, around education where individuals have taken out complaints but the practice still continues in the overall system. It is just not the way to achieve structural change. We believe that this legislation has a role to play in structural change, and that should be done through [representative actions and through not limiting claims to individuals].[22]

6.26 Stakeholders also informed the committee that allowing representative actions to be made pursuant to clause 122 would enable systemic discrimination to be

21 *Committee Hansard*, 23 January 2013, p. 22.

22 *Committee Hansard*, 23 January 2013, p. 22.

targeted.[23] The Public Interest Law Clearing House (PILCH) explained how this could be achieved:

> [The] Draft Bill should allow representative actions to be brought on behalf of multiple [applicants] affected by a particular course of conduct, as is currently possible in the Victorian jurisdiction under section 113 of the [*Equal Opportunity Act 2010* (Vic)]. This would give advocacy groups and human rights organisations standing in their own right and allow them to use their expertise and resources to pursue matters involving systemic disadvantage, rather than requiring individuals to mount their own legal challenges to discriminatory practices.[24]

6.27 Ms Rachel O'Brien of the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) echoed the views of other submitters concerning systemic discrimination. Ms O'Brien explained that allowing representative complaints would go some way in addressing systemic discrimination that is often experienced by the Indigenous community:

> [Individual] complaints to the Federal Court are also self prohibitive. This is of particular concern for NATSILS, given that Aboriginal and Torres Strait Islander peoples experience disproportionate levels of disadvantage and multiple factors of discrimination, and yet have low levels of engagement with the antidiscrimination system. Allowing representative complaints to proceed to court could go a long way to addressing some of the systemic issues facing Aboriginal and Torres Strait Islander peoples.[25]

6.28 Although many submitters were in favour of amending the Draft Bill to provide for representative claims,[26] Mr Daniel Mammone from the Australian Chamber of Commerce and Industry did not support the position that the Draft Bill be amended to provide for representative complaints.

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23 See, for example, Australian Council of Trade Unions, *Submission 310*, pp 13-14; Public Interest Law Clearing House, *Submission 425*, pp 27-28; Mr Tim Lyons, Australian Council of Trade Unions, *Committee Hansard*, 23 January 2013, p. 8; Ms Rachel O'Brien, National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Committee Hansard*, 24 January 2013, p. 44.

24 *Submission 425*, pp 27-28.

25 *Committee Hansard*, 24 January 2013, p. 44. See also: Ms Rachel O'Brien, NATSILS, *Committee Hansard*, 24 January 2013, p. 49.

26 See, for example, Australian Human Rights Commission, *Submission 9*, p. 13; Vision Australia, *Submission 324*, p. 10; Equality Rights Alliance, *Submission 352*, pp 15-16; Human Rights Law Centre, *Submission 402*, pp 54-55; Australian Lawyers for Human Rights, *Submission 406*, pp 14-15; Queensland Advocacy Incorporated, *Submission 412*, p. 2; Anti-Discrimination Commissioner of Tasmania, *Submission 429*, pp 26-27; COTA Australia, *Submission 430*, p. 5; Law Council of Australia, *Submission 435*, p. 54; National Council on Intellectual Disability, *Submission 448*, p. 7.

6.29 Mr Mammone argued that such an amendment would be a broadening of existing anti-discrimination provisions and lead, in his view, to more litigation:

> [I]t is not part of the existing framework of anti-discrimination laws. If it were to be included, the Attorney-General's own strategic framework has pointed out—and we have provided input—that changing those sorts of provisions would have the potential to increase litigation. So that is something we did not support in terms of this consolidated exercise…[T]here are issues associated with the objectives of, perhaps, the person that is not the complainant in a particular matter in representative actions. So there are a whole range of issues and associated policy reasons why we would oppose representative actions.[27]

Power to dismiss complaints

6.30 Clause 117 identifies the circumstances in which the AHRC can close complaints of unlawful conduct which are lodged with the AHRC. These circumstances include the ability of the AHRC to close a complaint if it is satisfied that the complaint is 'frivolous, vexatious, misconceived or lacking in substance' (paragraph 117(2)(c)).

6.31 Submitters were generally supportive of the ability of the AHRC to close complaints on the basis that they are frivolous, vexatious, misconceived or lacking in substance.[28] There was some concern, however, that even in these cases the 'preliminary assessment process' could cause respondents unnecessary angst. For example, Freedom 4 Faith noted:

> While the power to dismiss frivolous or vexatious claims is useful, experience suggests that courts, tribunals and commissions are very reluctant to exercise such a power, and if they do so, it tends to be only after the complaint has gone some way through the complaints process and it has become clear that it has no prospect of success. Before that can happen, a complaint must go through a preliminary assessment process, causing respondents unnecessary angst, inconvenience and cost.[29]

6.32 Professor Triggs from the AHRC discounted such concerns and explained that, in practice, the proposed provisions that will empower the AHRC to dismiss frivolous and vexatious complaints will put a 'strong brake' on complaints that are unable to be substantiated:

> [The Draft Bill] provides Australians and the business community with clarity and with cost-effective processes…[The AHRC's] role in handling the complaints…[is] an important gate-keeper role, for no matter arising under the bill can progress to the federal courts without first coming to the commission. The [AHRC], under current law, can close matters that are of

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27 *Committee Hansard*, 23 January 2013, pp 18-19.

28 See, for example, Australian Council of Human Rights Agencies, *Submission 358*, p. 17; Public Interest Advocacy Centre, *Submission 421*, p. 52; Law Council of Australia, *Submission 435*, p. 49.

29 *Submission 447*, p. 12.

> no legal substance, that are frivolous or where there is a more appropriate remedy…Under the [Draft Bill], the parties cannot go to the courts if we have closed a matter—that is, if we have terminated it or declined it on the grounds that it is without substance or frivolous. An exception is that the parties can go to the courts only if they have leave of the court itself.[30]

6.33 Professor Triggs explained that, at present, just over a third of the cases that come before the AHRC are in fact closed for these reasons:

> At the moment, the [AHRC] terminates or declines an average of 34 per cent of the claims that we receive; we conciliate 48 per cent of them. If there is no successful conciliation, the parties can then bring proceedings as a right in the Federal Court.[31]

6.34 Professor Triggs also observed:

> [T]o a significant extent the [Draft Bill] reflects existing state and Commonwealth laws and provides a foundation on which to embark on more extensive reform over the coming years through the three-year review process.[32]

30 *Committee Hansard*, 24 January 2013, p. 62.

31 *Committee Hansard*, 24 January 2013, p. 62.

32 *Committee Hansard*, 24 January 2013, p. 62.