



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC:BMSb100124

10 January 2024

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

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

Dear Secretary,

Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

The Law Society is grateful for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee on the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023. The Law Society's Human Rights Committee has contributed to this submission.

At the outset, we acknowledge that there are differing views among legal organisations and professionals as to an appropriate costs regime for anti-discrimination matters. It is understandable that there may be some hesitancy to support a costs model which departs in significant ways from the traditional model where federal courts, despite having broad discretionary powers to award costs in any manner seen fit, typically order that costs follow the event.¹

However, the consultations which informed the Respect@Work Report, and subsequent inquiries/reports considering costs provisions in anti-discrimination matters, made clear that the traditional model is failing to promote effective remedies, due to the risks to the applicant of an adverse costs order.² Such risks are exacerbated when the respondent is well-resourced, and the burden of a potential costs order becomes even greater.

The *Review into an appropriate cost model for Commonwealth anti-discrimination laws* undertaken by the Attorney General's Department in 2023 received multiple submissions, including from community legal centres, that advocated for an "equal access" model as the most effective way for applicants to enforce their rights and secure legal representation.³

¹ See s 43 of the *Federal Court Act 1976* (Cth) and s 214 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth).

² See history of consultation in Department of Parliamentary Services, Bills Digest No 33, 2023-24, [Australian Human Rights Commission Amendment \(Costs Protection\) Bill 2023](#), 27 November 2023.

³ See, for example, the submissions from Kingsford Legal Centre, the Grata Fund and Public Interest Advocacy Centre, National Legal Aid and Women's Legal Services Australia, published on the Attorney General's Department website [here](#) in response to its *Review into an appropriate cost model for Commonwealth anti-discrimination laws*.

On balance, the Law Society supports the passage of the Bill, as we consider the modified “equal access” approach is best placed to achieve the objectives set out in the Explanatory Memorandum as follows:

This reform is designed to alleviate the barrier to justice that the risk of an adverse costs order currently poses for applicants in federal unlawful discrimination court proceedings. Additionally, the Bill will provide greater certainty regarding costs to all parties involved in such proceedings.⁴

We emphasise that anti-discrimination law, as beneficial legislation with strong human rights and public interest underpinnings, should promote the right to equality and non-discrimination and enable effective remedy. These objectives, which are reflected in many of the international instruments to which Australia is a party, are not mutually exclusive.⁵ Rather, enabling effective remedy reinforces a culture of anti-discrimination, by holding those who discriminate to account for their unlawful actions.

Thank you for the opportunity to make a submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or sophie.bathurst@lawsociety.com.au.

Yours sincerely,



Brett McGrath
President

⁴ Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 at [2].

⁵ See articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights*, Article 6 on the *Convention on the Elimination of All Forms of Racial Discrimination*, Article 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women* and Article 4 of the *Convention of the Rights of Persons with Disabilities*.