Joint Submission to the Inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023

22 December 2023

Grata Fund is Australia's first specialist non-profit strategic litigation incubator and funder. We remove financial barriers to court, and support people and communities facing injustice to integrate litigation with movement-driven campaigns. We focus on supporting public interest cases in the areas of human rights, climate justice and democracy.

Grata Fund is a partner of the University of New South Wales Faculty of Law and Justice.

Contact:

Zaki Omar, Acting General Counsel
Courtney Law, Senior Solicitor (Strategic Litigation)

info@gratafund.org.au

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Contact:

Jonathan Hall Spence, Principal Solicitor

jhallspence@piac.asn.au

22 December 2023

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

Dear Committee Secretary

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

Grata Fund and the Public Interest Advocacy Centre (**PIAC**) are pleased to make a joint submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (**the Bill**).

We welcome the Bill's introduction of an equal access costs model to federal discrimination matters. This is a breakthrough development for victim-survivors of discrimination and harassment, and a reform for which we have long advocated.

The equal access costs model will go some way in removing adverse costs risk as a barrier to justice for victim-survivors. It also rightfully recognises the public interest that is served when perpetrators are held to account for unlawful behaviour.

We support the passage of the Bill.

However, we also consider that the following amendments would strengthen the Bill further and ensure that its aims are not undermined in practice. We recommend that:

1. The Bill should expressly exclude refusing offers of compromise from adverse costs considerations under paragraphs 46PSA(4) and (6)(b); and
2. Paragraph 46PSA(6)(c) should be removed from the Bill.

We make these recommendations based on our collective experience of working with public interest litigants, especially in federal discrimination matters, who have been deterred from the courts due to the risk of adverse costs orders. This submission reflects views which our organisations have expressed previously,

including in our joint submission to the Attorney-General's Department's review into an appropriate cost model for Commonwealth anti-discrimination laws.

The Bill should expressly exclude offers of compromise from adverse costs considerations under paragraphs 46PSA(4) and (6)(b)

Paragraphs 46PSA(4) and (6) of the Bill provide that an applicant may not be able to recover or could otherwise be liable for costs incurred as a result of their unreasonable act or omission. These provisions represent exceptions to the default equal access rule, which would ordinarily guarantee an applicant's right to recover costs when successful or protect an applicant from an order to pay the respondent's costs.

It is critical that these exceptions are carefully framed, in order to avoid eroding the costs certainty that the equal access model is designed to provide.

We welcome the guidance that is provided in the Bill's Explanatory Memorandum, which notes that the reference to a successful applicant's 'unreasonable act or omission' in paragraph 46PSA(4) 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.'* [1]

However, it remains unclear whether this guidance also applies to the standard of an unreasonable act and omission in paragraph 46PSA(6)(b). Given that paragraphs 46PSA(4) and (6)(b) both contemplate an adverse costs consequence flowing from an applicant's unreasonable act or omission, it should be made clear that the Explanatory Memorandum's guidance on the phrase in paragraph 46PSA(4) applies equally to paragraph 46PSA(6)(b).

We submit that guidance of this kind should also be included in the Bill itself in order to ensure its appropriate implementation. In particular, we are concerned that the current terms of paragraphs 46PSA(4) and (6)(b) could still encourage respondents to exploit the use of offers of compromise or Calderbank offers and the threat of adverse costs orders to force applicants to settle.

As noted by Thornton et al, Calderbank offers are used by respondent employers in discrimination matters as 'part of the litigation game' to force settlement.[2] An

[1] Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) 13.
[2] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and costs in sexual harassment litigation: A doctrinal, qualitative and quantitative study*, Australian National University, 2022, 14; 91.

applicant who refuses a Calderbank offer risks an adverse costs order for indemnity costs if they proceed to litigation and ultimately receive a less favourable outcome. Similar 'offer of compromise' and costs rules are formalised under Part 25 of the *Federal Court Rules 2011* (Cth) (**FCR**).

By pressuring applicants to settle under the threat of indemnity costs, these respondent strategies effectively recreate the costs risk and chilling effects that the Bill seeks to address. We are concerned that the Bill itself does not make any provision for how the equal access model is supposed to interact with Calderbank offer principles or the FCR regime.

We echo the observations made in the Australian Discrimination Law Experts Group's submission to this inquiry, that a costs consequence flowing from an offer of compromise may be suitable for commercial disputes but that this type of rule operates oppressively against victim-survivors in discrimination cases.

To give effect to the beneficial intent of anti-discrimination legislation and the rationale underpinning an equal access costs model, the Bill should expressly exclude formal and informal offers of compromise from any assessment of the reasonableness of an applicant's conduct for the purpose of making an adverse costs order.

We suggest that this could be achieved by the insertion of an additional subsection in clause 46PSA, clarifying the matters that will not be considered unreasonable for the purposes of paragraphs 46PSA(4) and 46PSA(6)(b), consistent with the comments in the Explanatory Memorandum:

> *Certain acts not to be taken to be unreasonable*
>
> *(8) For the purposes of subsections 46PSA(4) and 46PSA(6)(b), the following acts by an applicant are not, of themselves, to be taken to be unreasonable:*
>
> *(a) refusal of a settlement offer, including an offer of compromise made in accordance with Part 25 of the Federal Court Rules 2011 (Cth) or an offer expressed to be made in accordance with the principles enunciated in Calderbank v Calderbank [1975] 3 All ER 333;*
>
> *(b) refusal to participate in a conciliation;*
>
> *(c) the running of novel arguments; or*
>
> *(d) a self-represented litigant's conduct to the extent it reflects a lack of legal expertise.*

Recommendation 1: The Bill should be amended to include a further subsection to clause 46PSA, expressly providing that certain acts including the

refusal of offers of compromise should not be taken to be unreasonable for the purposes of adverse costs order considerations under paragraphs 46PSA(4) and (6)(b).

The adverse costs exception in paragraph 46PSA(6)(c) should be removed from the Bill

The exception under paragraph 46PSA(6)(c) represents a significant departure from the principles and rationale of an equal access costs model. Outside of an applicant's unreasonable or vexatious conduct, paragraph 46PSA(6)(c) introduces an additional set of circumstances in which applicants could be ordered to pay the respondent's costs.

The Explanatory Memorandum notes that 'this modification to the equal access model has been made to strike the appropriate balance between alleviating barriers to accessing justice for applicants in anti-discrimination proceedings and the burden on respondents.'

In our view, paragraph 46PSA(6)(c) inappropriately stratifies respondents based on broad references to their power and financial circumstances relative to an applicant. In doing so, the exception indirectly sends the message that only certain types of applicants should benefit from costs protection against certain types of respondents. Practically, this could shield individual or small corporate respondents from accountability and reinforce the barriers facing victim-survivors in workplaces and other public spaces.

The equal access model is predicated on the principle that applicants should not have to risk facing financial ruin for bringing discrimination and harassment matters to the courts for judicial consideration, regardless of who the respondent is. We submit that paragraph 46PSA(6)(c) unnecessarily erodes the costs certainty that the equal access cost model is designed to provide and we recommend that it be removed on this basis.

Recommendation 2: Paragraph 46PSA(6)(c) should be removed from the Bill.

Conclusion

For these reasons, Grata Fund and PIAC support the passage of the Bill and recommend that it be strengthened through the following amendments:

1. The Bill should be amended to include a further subsection to clause 46PSA, expressly providing that certain acts, including the refusal of offers of compromise, should not be taken to be unreasonable for the purposes of

adverse costs order considerations under paragraphs 46PSA(4) and (6)(b); and

2. Paragraph 46PSA(6)(c) should be removed from the Bill.

We would welcome the opportunity to discuss our submission further with the Senate Legal and Constitutional Affairs Committee.