Queensland Law Society

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Office of the President

12 December 2023

Our ref: [KB:MC]

Dr James Popple
Chief Executive Officer
Law Council of Australia
Level 1, MODE3
24 Lonsdale Street
Braddon ACT 2612

By email: [redacted]

Dear Dr Popple

Costs in anti-discrimination matters – Australian Human Rights Commission (Costs Protection) Bill 2023

Thank you for the opportunity to provide feedback for inclusion in the Law Council's submission on the Australian Human Rights Commission (Costs Protection) Bill 2023 (**Costs Bill**) and in relation to costs in ant-discrimination matters, generally.

We have not been able to undertake a comprehensive examination of all of the relevant issues due to time constraints. We note submissions on the Costs Bill are to be provided to the Senate Legal and Constitutional Affairs Legislation Committee by 9 January 2024. Should there be further consideration of the Law Council's policies and positions on these issues more broadly, QLS would appreciate being further consulted.

The following comments have been prepared in consideration of views of members of our Industrial Law, Human Rights and Public Law and Health and Disability Law Committees, who have substantial expertise in this area.

Costs Bill

Based on the feedback we have received, as well as our previous consideration of these issues, we are generally supportive of the approach taken in the Costs Bill. We have previously expressed support for recommendation 25 from the Respect@Work report[1] which sought to have section 570 of the *Fair Work Act 2009* (Cth) (**FW Act**) inserted into the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). We note the Costs Bill adopts a modified approach to principles set out in the FW Act provision.

[1] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, 2020

We also note some of our members are part of organisations in the Power to Protect Coalition. This group, as you are no doubt aware, has expressed support for legislative reform similar to the Costs Bill.[2]

Broad discretion model

In respect of the proposed alternative approach advanced in your memorandum, we note the following, with the disclaimer that these issues have not yet been fully ventilated within our policy committees, given the availability of our members at this time of year.

We note the views outlined in your memorandum from the Law Council's Advisory Committees which include those in relation to preserving the general principles of costs and the discretion of the court. These are important principles in our court system, however, should be balanced against providing real access to justice and the upholding of human rights. Any concerns about the legislation being too prescriptive in this regard, may be alleviated by proposed section 46PSA(6) of the Costs Bill and particularly by subsection (a), which provides that the applicant may be ordered to pay costs if the court is satisfied there was no reasonable cause (or the proceedings were instituted vexatiously).

In relation to unintended consequences created by a presumption that the respondent is a large and wealthy employer, the Costs Bill, at proposed section 46PSA(6)(c) allows for the applicant to be ordered to pay costs in circumstances where the respondent does not have a significant power advantage over the applicant nor significant financial or other resources relative to the applicant. We note comments about the reference in the Explanatory Memorandum for the Costs Bill to an older, more experienced employee having a power advantage and that this might not justify a costs order being made against them. However, it appears this reference was added to demonstrate that a nuanced consideration should be undertaken. The power advantage would still need to be "significant" and the other two factors in proposed section 46PSA(6)(c) must also be present.

On balance we consider the 'broad discretion model' would still cause concern for applicants as the default position remains that costs follow the event. The risk of an adverse costs order on this basis would still create an additional barrier for people in being able to pursue these claims (we note these claims are difficult to pursue for other reasons as well).

In relation to whether the changes proposed in the Costs Bill may lead to calls for changes in other areas of litigation where there is a power imbalance, we refer to the special nature of these types of matters where a person has a protected attribute and risk that their human rights are limited. These considerations, in our view, justify the approach taken by the Government and as generally recommended by the Respect@Work report.

Queensland's approach

The following information about Queensland's approach to costs in discrimination matters may provide some assistance.

Review of Queensland's Anti-Discrimination Act

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[2] Power to Project, *Joint Statement*, accessed via: https://www.hallpayne.com.au/media/2287/power2prevent-joint-statement-december-2023.pdf

Queensland's *Anti-Discrimination Act 1991* was reviewed last year by the Queensland Human Rights Commission. The final report[3] made the following observations involving costs in relation to representative complaints, at page 182:

> While creating more flexible criteria for commencing representative complaints may improve accessibility, it does not address the overarching complexity inherent in pursuing these types of matters. Complainants require legal advice and representation which increases costs for a complainant who is not entitled to, or cannot gain access to, the limited legal aid or community legal centre assistance available.
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> Some submissions noted that the prospect of recovering legal costs, which is possible in the federal jurisdiction, may increase accessibility to legal representation, as legal representatives could conduct these matters under 'no win no fee' arrangements or through litigation funding. This could be achieved by allowing representative complaints to apply to the Supreme Court, using Part 13A of the Civil Proceedings Act.
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> On the other hand, a costs jurisdiction is accompanied by a risk of a costs order, which can deter people from bringing a complaint. Retaining a no-costs jurisdiction therefore has merit, particularly where the remedy sought does not involve significant awards of monetary damages and the complainants are unable to attract litigation funding.

In respect of 'Organisation and representative complaints', the Review made a recommendation (Rec 11.4):

> "Where the complaint cannot be resolved through the Commission's dispute resolution processes, the complainant in a representative complaint may elect to lodge their complaint either in:
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> • the tribunal, a no costs jurisdiction, or
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> • the Supreme Court, a costs jurisdiction.

This will enable complaints to be made in a "no costs jurisdiction" if the complainant does not wish to risk an adverse costs order being made.

We emphasise that the comments and recommendations outlined above were made in relation to representative complaints (i.e. complaints on behalf of a class of people) which are generally considered complex and costly proceedings to run.

In respect of time limits, the Review also recommended that the Tribunal should have jurisdiction to make a merits review of decisions by the Commissioner in relation to the discretion to provide dispute resolution and the discretion to be able to award costs if an application is frivolous or vexatious.[4]

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[3] Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991*, July 2022.

[4] Recommendations 8.3, 9.7

These reforms are yet to be legislated. The report is otherwise silent on current rules regarding costs in anti-discrimination complaints.

Recent Queensland decisions

Costs in Queensland anti-discrimination tribunal proceedings have been recently considered by the Queensland Civil and Administrative and Queensland Industrial Relations Commission (**QIRC**) in *Watego v State of Queensland and ors* (costs) [2023] QCAT 292[5] and *Anters v JM Group Holdings Pty Ltd (No. 3)* [2023] QIRC 238[6] (**Anters**). In the former, Member Gordon awarded costs to the respondent on the basis of the poor merits of the case; however, in consideration of the public interest factors and to reduce the 'chilling' effect that this order might have on other prospective claims, the amount of costs was reduced.

In Anters, the QIRC considered whether costs should be awarded in the interests of justice as the default position is that each party bears their own costs pursuant to the respective legislation.[7] At paragraph 39 of the decision, Industrial Commissioner McLennan provided:

> [39] In deciding whether to make such order, the Commission may have regard to:
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> (a) whether a party to the proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding;
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> (b) the nature and complexity of the proceeding;
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> (c) the relative strengths of the claims made by each of the parties to the proceeding;
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> (e) the financial circumstances of the parties to the proceeding;
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> (f) anything else the commission considers relevant.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

[redacted]

Chloé Kopilović
President

[5] https://www.queenslandjudgments.com.au/caselaw/qcat/2023/292
[6] https://www.queenslandjudgments.com.au/caselaw/qirc/2023/238
[7] Schedule 2 of the *Industrial Relations Act 2016* (QLD).