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Submission: Costs Reform in Anti-Discrimination Law

The Free Speech Union of Australia (**FSU**) writes in response to the consultation on *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023*.

The FSU is a non-profit non-partisan organisation set up to promote the fundamental human right of Freedom of Speech within Australia. We defend, protect and promote the Free Speech rights of all Australians irrespective of the content of the speech.

The FSU is responding to this consultation both as an organisation with a general interest in Free Speech and as a union with members who are directly impacted by the outcome. We are thus in the position of seeing this from both sides: we sit in the position of both defending members from discrimination and defending members from the abuse of anti-discrimination law.

We consider it to be a noble goal to ensure genuine access to justice around discrimination. Many of our members are subject to unlawful discrimination, in part for what they might have said. Unfortunately, we are concerned that this Bill as presently drafted undermines Free Speech, which is especially vital (amongst other things) for challenging discrimination. We also consider that this will likely have the unintended effect of undermining discrimination law.

There are three main areas of concern that we have:

1. Collateral Attacks and Cost Shifting

The Free Speech Union of Australia believes that people should be protected from victimisation for making accurate claims of discrimination. This is an important free speech protection which has strong similarities to whistleblowing. With this in mind, we are concerned that the present proposal would undermine any effective protection from victimisation, because it will become a form of **de-facto costs shifting,** having the opposite effect as to what is intended. This especially disadvantages the most vulnerable applicants or complaints, who most need this protection. It also ***reinforces*** **existing power disparities.**

The flaw is this: Suppose that Employee A was sexually harassed (or subject to other discrimination) by their Employer B abusing their power in some way.[1] A brings a claim of discrimination against B. To protect themselves, B responds by making a weak or vexatious claim of discrimination against A.[2] Given the power disparity, B has the advantage of being able to afford lawyers as well as being able to risk losing financially against A. But A is in a different position. An employer could also tacitly encourage their employees, say C and D, to file a claim against A. A is now in an invidious position, because if they lose on **any** point in the claim brought by B, B (and possibly C and D) is automatically entitled to their costs from them.

The effect of this situation is to put A at a considerable disadvantage. Despite the stated intention of the legislation: they will likely compromise their claim under such a system or be dissuaded from bringing it in the first place.[3] The result is essentially to adopt full cost shifting in discrimination claims, making the situation far worse than the existing cost-neutral position.

To correct this asymmetry, we propose removing claims brought against natural persons and small organisations from this Bill's planned costs entitlement. This would genuinely help remove the asymmetry in power this Bill is directed at. Under this amended proposal, if Person A brought a claim against large organisation B, then they would still automatically receive costs if they won, but crucially B (or an Employee of B) bringing proceedings against A would not have this benefit or protection.[4]

<u>Recommendation 1:</u> Modify the wording of the entitlement to costs provision to **only** apply to large organisations with a turnover above $10 million dollars a year, not natural persons. This could be done as follows (additional text in **bold**):

S.46PSA

…

(2) Subject to subsection (4), if the applicant is successful in proceedings on one or more grounds, the court must order each ***large corporate*** *respondent against whom the applicant is successful to pay the applicant's costs.*

Definition: A 'large corporate respondent' is an organisation with an annual turnover of over $10 million dollars per year.

[1] Most serious harassment claims arise from power disparities: see note 8 below.

[2] The weaponisation of discrimination law by the powerful is a well-known concern: see e.g. Edelman, Lauren B, Working Law: Courts, Corporations, and Symbolic Civil Rights, University of Chicago Press, 2016, p163 or Dobbin, Frank, and Alexandra Kalev. "The civil rights revolution at work: What went wrong." *Annual Review of Sociology* 47 (2021): 281-303, p294.

[3] This is a common concern with cost-shifting and discrimination claims – for an example, see Lawson, Anna, and Maria Orchard. "The anticipatory reasonable adjustment duty: Removing the blockages?" *The Cambridge Law Journal* 80.2 (2021): 308-337.

[4] It is also worth noting that large organisations will be able to insure against this risk, which will further encourage best practice. Smaller organisations and natural persons will find this more difficult, especially if they are impoverished to begin with, which the most vulnerable claimants usually are.

2. Collateral Implications of Weak and/or Vexatious claims

Existing anti-discrimination law is frequently used in attempts to suppress speech. Unfortunately, certain provisions conflate discrimination with speech that someone dislikes or finds offensive. This includes harassment provisions, which have been repeatedly redrafted in their breadth as a means for compensating for their weak enforcement.[5] We would recommend adjusting existing anti-discrimination laws to remove the ability to make complaints about speech, or of a 'hostile work environment' - with the ability to work at home, the original purpose of these provisions no longer applies.[6] For the most part, these are otherwise known as 'hate speech' provisions.[7] It is profoundly important that discrimination law be revised to only deal with substantive actions (including the use of official power), rather than speech that someone happens to dislike. Taking the example of harassment, "*the most diehard free speech absolutist recognizes that the speech involved in quid pro quo harassment is tantamount to threats or extortion*"[8], but it demeans those people subject to this type of conduct by conflating it with someone making a comment that one person might find offensive (i.e. something that is **not** harassment).

The fear of vexatious claims is also important to consider. The likely result of the present changes is that employers will react to minimise their risk: after all, employers can make a decision "*for [nearly] any reason or no reason, so long as it is not a discriminatory reason*".[9] For example, they might be less likely to hire people who are perceived to be outspoken[10], or equally from minority groups who are perceived to be more likely to make a discrimination claim (whilst saying they are doing something else), something which has been empirically shown in respect of other reforms.[11] The conflation of the most egregious conduct with trivial insults as being discrimination undermines the respect for this area of law. Without a narrowing of the substance of anti-discrimination law, anti-discrimination law will be brought into disrepute, and with it the opportunities of those it ostensibly protects.

There is also the risk that weak claims that are not clearly vexatious might be 'strategically' tagged on to a claim to (1) increase legal costs including the profits of lawyers and (2) put pressure on one's opponents. To protect against this, **the legal**

[5] An example is the Sex Discrimination Act 1984, which has been subject to several redrafts, which has expanded harassment from an abuse of power, onto anything said or done of a sexual nature (broadly construed) which is *possible* for one person to be offended.

[6] For the original purpose, see e.g. Balkin, Jack M. "Free speech and hostile environments." *Columbia Law Review* (1999): 2295-2320.

[7] Strossen, Nadine. *Hate: Why we should resist it with free speech, not censorship*. Oxford University Press, 2018.

[8] Nadine Strossen, The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump, 71 *Chi.-Kent L. Rev*. 701, 704 (1995).

[9] Rutherglen, George, 'Concrete or Abstract Conceptions of Discrimination?', in Deborah Hellman, and Sophia Moreau (eds), Philosophical Foundations of Discrimination Law, Oxford p131.

[10] This is the well-known concern of 'collateral censorship' – see Balkin, Jack M. "Free speech and hostile environments." *Columbia Law Review* (1999): 2295-2320.

[11] An account of this is in Strossen, Nadine. *Hate: Why we should resist it with free speech, not censorship*. Oxford University Press, 2018.

costs available should be capped, to be no more than a multiple of the damages awarded, save in cases where further effective action is obtained (e.g. restoration of employment, or obtaining reasonable adjustments), which can be similarly valued in financial terms.

Recommendation 2: In conjunction with the cost reform, remove all 'offence' based provisions from anti-discrimination law, which may potentially undermine free speech and to tie harassment to power relationships within the workplace. In respect of harassment, these provisions should be narrowly tailored to exclude trivial upsets attracting the epithet of discrimination. For instance, one might revise s.28A of the Sex Discrimination Act (1984) to read as follows:

(1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if:
(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
in circumstances ***substantially connected to the workplace*** *in which a reasonable person****,*** *having regard to all the circumstances, would* ***experience a severe violation of their dignity*** ~~*have anticipated the possibility that the person harassed would*~~ *be* ~~*offended*~~ *or* ***be*** *intimidated.*

In cases outside of harassment, we would propose simply deleting the relevant sections, such as Section 18C of the Race Discrimination Act (1975).

Recommendation 3: A provision should be added to the Bill limiting the amount of costs recoverable by an applicant to being in proportion to those damages or remedies recovered. Specifically, we propose:

The legal costs recoverable under S.46PSA (2) are limited to two times the damages or the value of other benefits (such as reasonable adjustments or restoration of employment) obtained from the discrimination proceedings.

3. Weakening of Anti-Discrimination Law on the Ground

We are also concerned that this proposal as presently formed will undermine the operation of discrimination law for people who have genuine claims. The potential consequences of this present proposal include:

1. *Increasing the load on the Federal Court and the Australian Human Rights Commission.* This will heavily delay the determination of claims and cases. In the United Kingdom, even something as simple as removing the fees to make a claim had a considerable impact on the number of cases and in turn the timeliness of

their disposal.[12] This proposal will likely have a far greater effect. Delayed justice is denied justice, especially for discrimination claims, given the relatively distressing nature of bringing them as a claimant.

2. *Reducing the respect of discrimination law amongst the community.* Provisions that are likely to be misused by activists will sully the reputation of discrimination law amongst the lay public. Yet discrimination law only operates effectively if it has the genuine respect of the community: reduced respect will lead to reduced compliance and a range of techniques deployed to circumvent it.[13] It also increases the risk of victimisation for people who raise genuine claims of discrimination.[14]
3. *Stigmatisation of complainants.* Weakening the respect for discrimination law also risks stigmatising complainants, which is likely to inhibit the bringing of genuine claims. This is something that will disproportionately impact the most vulnerable groups.[15]
4. *Subverting 'State Level' Anti-Discrimination Law.* It does not appear that this Bill will apply to anti-discrimination law in the States. This will place claimants whose concerns straddle State and Commonwealth Law at a disadvantage. Consideration should be given to exploring an agreement with the States, so that the process is consistent, as well as to help minimise the impact upon the Federal Court System.

It is important to remember the distinction between 'Law in Books' and 'Law in Action'.[16] We hope that this bill can be carefully reconsidered to remove the unintended consequences, as they risk fundamentally undermining anti-discrimination law.

If there are any questions with respect to this submission, please direct them to Dr Reuben Kirkham, Operations Director, on the details below.

Yours sincerely,

Free Speech Union of Australia

[12] https://www.lewissilkin.com/en/insights/employment-tribunal-delays-as-the-wait-gets-worse-what-can-employers-do

[13] This can include by Judges: see Lady Hale's (a former president of the UK Supreme Court) tacit comments on this concern in a public lecture (https://www.supremecourt.uk/docs/speech-130710.pdf).

[14] Whilst Australia unusually criminalises victimisation with a potential prison sentence, even this has had little or no effect, with no prosecutions having taken place under this provision.

[15] Disability is perhaps the most pointed example of this issue: see Harris, Jasmine E. "Taking disability public." *U. Pa. l. Rev.* 169 (2020): 1681.

[16] Goddard, David. *Making Laws That Work: How Laws Fail and How We Can Do Better*. Bloomsbury Publishing, 2022.