

CLUBS AUSTRALIA SUBMISSION AUSTRALIAN HUMAN RIGHTS COMMISSION AMENDMENT (COSTS PROTECTION) BILL 2023

Clubs Australia welcomes the opportunity to comment on the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (the Bill).

SUMMARY OF FEEDBACK

- **Noting the serious personal and societal impacts of sexual harassment and other forms of discrimination, Clubs Australia supports, in principle, reforms that remove barriers for discrimination victims to assert their rights through the courts.**
- **Clubs Australia considers that any reforms should also ensure a fair and equitable process for businesses subject to discrimination complaints. Particularly, businesses that are confident in their prospects of defending a discrimination claim should be encouraged to advance this position before the Australian Human Rights Commission (AHRC) and Federal Court.**
- **On this basis, Clubs Australia is concerned that the Bill will encourage businesses to settle claims that do not constitute discrimination and ultimately deter businesses from defending themselves.**

SUMMARY OF RECOMMENDATIONS

- **Noting the Government's commitment to developing a new cost model, Clubs Australia recommend adopting the 'soft cost neutrality model'.**
- **If the 'equal access model' is adopted as per the Bill, the Government should make further amendments to ensure unmeritorious claims are discontinued before significant legal costs accumulate. These include strengthening AHRC's power to require a complainant to seek leave before progressing to the Court.**
- **Clubs Australia recommend that the Government review the operation of the chosen cost model within two years from commencement to assess whether the reforms have succeeded in removing barriers for discrimination victims and supporting businesses to defend claims which are not discrimination.**
- **Clubs Australia recommends expanding the explanatory memorandum to include an assessment of the Bill's impact on management liability insurance premiums.**

CLUB INDUSTRY

Clubs Australia represents more than 6,000 licensed clubs that directly employ 140,000 workers. Clubs provide their members various social, recreational, community, and commercial services.

Clubs are not-for-profit, owned by their members, and seek to support their local community. Clubs vary in size and purpose, ranging from volunteer-run facilities servicing small communities to large businesses employing hundreds of staff across multiple operations.

Clubs Australia's most recent National Club Census found that 86 per cent of Australia's licensed clubs have 15 or fewer employees (small clubs).

DISCRIMINATION COMPLAINTS AGAINST CLUBS

Clubs serve as a pillar for their local communities and have high patronage rates across a broad cross-section of age groups, ethnicities, and socio-economic backgrounds. Because of the high volume of interactions with the public, clubs tend to face more discrimination claims than other businesses.

Discrimination complaints against clubs are often unmeritorious, which creates challenges for clubs, particularly those with limited financial resources.

Furthermore, during the COVID-19 pandemic, clubs adopted health restrictions like requiring patrons to wear masks and show vaccine certificates. These measures were designed to ensure the safety of patrons and comply with the law. While enforcing these directions, some clubs often faced unmeritorious discrimination claims, often from antagonistic patrons who refused to wear masks or show vaccine certificates.

Many of these complainants were able to seek settlements from clubs on the basis of disability discrimination, given the clubs' reluctance to incur legal expenses in the courts.

These instances highlight the capacity for unmeritorious complainants to game the discrimination system and also underscore how the legal costs of defending a claim can influence a respondent's decision to settle.

SOFT COST NEUTRALITY

Clubs Australia supports maintaining the status quo in awarding costs in anti-discrimination cases. However, noting the Government's commitment to adopting a new model, we support the soft cost neutrality model per Clubs Australia's previous submission.

Clubs Australia believes the soft cost neutrality model provides courts with the greatest discretion out of the proposed models and would provide clubs, in their capacity as a respondent, with opportunities to recover costs where a claim is not substantiated.

Under alternative models, such as the equal access model, clubs will be deterred from defending themselves in Court because the associated legal costs will almost always exceed any settlement amount the complainant seeks.

Unlike tribunals like the Fair Work Commission, where each party tends to bear their own costs, Federal Court costs frequently exceed \$100,000. Because these costs are unlikely to be recovered, an employer with reasonable prospects of success would have little reason to defend the discrimination claim in Court.

Employers may be compelled to pay or accept significant settlements if the amount is less than the estimated Federal court costs, even where the claim is vexatious or unmeritorious.

Small clubs, particularly, will struggle to deal with such a scenario as they will be unable to absorb the financial costs of a legal proceeding.

Clubs Australia notes that the equal access model increases the risk of unmeritorious discrimination complaints progressing to Court. These complaints may lack substance, despite not being vexatious.

Noting the Government's commitment to developing a new cost model, Clubs Australia recommend adopting the 'soft cost neutrality model'.

BETTER MECHANISMS TO DISCONTINUE UNMERITORIOUS CLAIMS

The Bill proposes to amend the *Australian Human Rights Commission Act 1986* (AHRC Act) to insert a modified 'equal access' cost protection provision to apply consistently across federal anti-discrimination laws.

The modified 'equal access' approach adopts the requirements of the equal access model but adds the ability to award costs against an applicant in certain circumstances, such as where the applicant instituted the proceedings vexatiously.

As discussed earlier, the significant Federal Court costs will likely discourage businesses from defending themselves against claims against which they would ultimately succeed.

Accordingly, if the equal access cost model is to be adopted by the Government, we recommend that the Government make further amendments to ensure that claims are discontinued before significant Federal Court costs are accumulated.

Through its conciliation functions, the Australian Human Rights Commission (AHRC) is best placed to act as a barrier against unmeritorious complaints progressing to Court.

Amendments to the complaints system were made in 2017 by the *Human Rights Legislation Amendment Bill 2017*, to empower the AHRC to terminate unmeritorious complaints.

Despite these changes, Clubs Australia has observed that the legislation remains insufficient to enable AHRC to terminate unmeritorious complaints in a way that would require the person to seek leave before progressing to the Federal Court.

Rather, AHRC continues to terminate these complaints on the ground that the dispute cannot be conciliated, thereby entitling the complainant to proceed to Court without seeking leave. Many of these complainants rely on highly speculative evidence.

Strengthening AHRC's powers will ensure that only meritorious cases proceed to Court.

Clubs Australia recommends significant amendments to the equal cost model if it is to be adopted to ensure respondents are not disproportionately impacted.

REVIEW OF CHOSEN COST MODEL

Given the complexity of the Court and legal systems, a change to a “downstream” matter, like how costs are awarded, will have uncertain and potentially unpredictable changes on “upstream” matters, such as how parties deal with a dispute in its early stages.

Clubs Australia believes it would be appropriate to review the operation of the cost provisions within the first two years to ensure the model is operating as intended. This review should include public consultation and an analysis of whether the objectives of the reforms have been achieved, as well as any perverse outcomes or unintended consequences.

Clubs Australia recommends that the Government review the operation of the chosen cost model within two years from commencement, to assess whether the reforms have succeeded in removing barriers for discrimination victims and supporting businesses to defend claims that are not discrimination.

INSURANCE PREMIUMS

In its prior submissions, Clubs Australia noted that the inability for businesses to recover their legal costs in Court would result in insurers recommending that businesses settle more discrimination disputes. In turn, these modified dynamics may result in higher management liability insurance premiums in line with the higher risk of costs.

Clubs Australia notes that the explanatory memorandum to the Bill does not include any analysis or assessment of this matter. A regulatory impact statement (RIS), which may have considered this issue, was not conducted because the report underpinning the changes was certified as meeting the requirements of a RIS.

Clubs Australia believes that the impact of the proposed reforms on management liability insurance premiums should be assessed to support the necessary scrutiny of the Bill.

Clubs Australia recommends that the explanatory memorandum be expanded to include an assessment of the Bill's impact on management liability insurance premiums.

CONTACT INFORMATION

Clubs Australia appreciates the opportunity to provide a submission. For further information, please contact Simon Sawday, Executive Manager of Policy and Government, on 0451661475 or ssawday@clubsaustralia.com.au.