



GRATA FUND

Free and Equal – An Australian Conversation on Human Rights
Submission – 8 November 2019



Grata Fund is a partner of the University of New South Wales Sydney Law School.



About Grata Fund

Grata Fund provides third party litigation funding by way of adverse costs protection and disbursement funding to plaintiffs in public interest matters. Grata Fund typically funds litigation that has a non-pecuniary outcome or for which the pecuniary outcome is a secondary issue. Regardless, we do not take a financial return in exchange for our support.

Since 2016, Grata Fund has provided adverse costs and disbursement funding in a range of matters initiated in the Federal Court of Australia and the High Court of Australia against government and corporate actors and by individuals represented by community legal groups including the Public Interest Advocacy Centre in New South Wales and Fitzroy Legal Service in Victoria.



Introduction

We welcome the Australian Human Rights Commission's (**AHRC**) Free and Equal Project and thank the AHRC for the opportunity to make a submission.

Public interest litigants and legal organisations in Australia currently rely on third party litigation funders to enable plaintiffs to pursue critical public interest litigation in spite of significant adverse costs risks.

Our submission principally relates to ensuring the accessibility of the courts if a human rights act is introduced at the federal level. Specifically, Grata Fund supports the introduction of a judicially enforceable human rights act at the federal level. We submit that the courts should be no cost jurisdictions for hearing disputes arising under such an act, to enable public interest litigants to access justice without facing prohibitive adverse costs barriers.

This submission focuses on two questions from the Issues Paper:

2. How should human rights be protected in Australia?
3. What are the barriers to the protection of human rights in Australia?

How should human rights be protected in Australia?

Australia remains the only western democracy without a bill of rights or a national human rights act.¹ The current human rights framework in Australia is inadequate, with the Constitution and the common law providing protection for only a small number of rights.² This means that ordinary people in the community face barriers to accessing and enforcing

¹ George Williams, "The High Court, the Constitution and Human Rights" (2015) 21(1) *Australian Journal of Human Rights* 1, 2.

² The Australian Constitution expressly protects the right to vote; protection against the acquisition of property on unjust terms; the right to trial by jury for a federal indictable offence; freedom from state adoption of religion; and prohibition on discrimination on the basis of state of residency. The High Court has also found that the Constitution includes the implied right to freedom of political communication: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; See also, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.



their basic human rights, diminishing their ability to hold government and corporations to account for human rights breaches. Despite significant support in the community for a national human rights act,³ successive federal governments have failed to enact a human rights act.

Recommendation:

1. Grata Fund recommends that human rights should be protected in Australia through the enactment of a comprehensive, judicially enforceable human rights act at the Commonwealth level. This human rights act should provide access to effective remedies, including declarations, injunctions, compensation and damages.

What are the barriers to the protection of human rights in Australia?

A major barrier to the protection of human rights in Australia is the prohibitive adverse costs regime. Many human rights matters are not pursued in Australia due to the adverse costs risk, leaving unjust policies and laws unchallenged. For example, estimates by Justice Connect suggest that 9 out of 10 meritorious cases aren't reaching the courts, simply due to the financial barriers caused by the risk of adverse costs orders.

Discrimination law remains one of the few areas where Australia's international human rights obligations are incorporated in domestic law. However, the existing costs jurisdiction in the Federal Circuit Court and Federal Court for discrimination complaints brought under the federal discrimination law statutes act as a barrier to access to justice.⁴ Currently, the *Australian Human Rights Commission Act 1986* (Cth) requires that

³ 87% of Australians support the introduction of a Human Rights Act: National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009), xxiv.

⁴ *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); and *Age Discrimination Act 2004* (Cth).



applicants and respondents in discrimination matters must bear their own costs unless an exception applies.⁵

This adverse costs risk has a chilling effect on litigation. It is estimated that only 10% of discrimination complaints at the federal level proceed to court, resulting in a very small number of adjudicated cases each year.⁶ As noted by Gaze and Hunter, 'some level of litigation is desirable in the public interest in discrimination cases, in order to establish precedents that will assist future settlement, to achieve outcomes going beyond the interests of an individual complainant, and to publicise the legislation so that it can both empower potential future complainants and deter potential future discriminators'.⁷

Public interest litigants seeking adverse costs protection in matters that have minimal or no prospect of financial return have limited options:

- Secure capped support from the Grata Fund where it meets our funding priorities; or
- Secure capped support via ad hoc corporate social responsibility contributions from commercial litigation funders;⁸ or

⁵ *Australian Human Rights Commission Act 1986* (Ct), Part IIB Division 2.

⁶ Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32 *University of New South Wales Law Journal* 699, 702.

⁷ *Ibid*, 700.

⁸ For example, Public Interest Advocacy Centre (PIAC) clients are eligible for limited support from commercial litigation funders via PIAC's 'Adverse Cost Guarantee Fund'. The Fund, established in 2016, receives guarantee facilities of \$10,000/year from several commercial funders annually - enough to support about one case per year. Also, IMF Bentham has from time to time supported disbursement funding and adverse cost protection in important public interest matters - most recently in 2015 in *NAAJA v NT [2015] HCA 41*. For more information please see:

<https://www.benthamimf.com/about-us/corporate-social-responsibility>.



- In exceptionally rare cases, successfully fundraise the significant funds required and - for adverse cost risk - create a facility to return funds to donors in the event their donations aren't required.⁹

If unable to secure support, lawyers must advise their clients that - despite having a legitimate claim to bring - they run the risk of financial catastrophe if they are unsuccessful in court. Understandably, most individuals are unable or unwilling to take such an enormous risk. In effect, these people are barred from accessing the courts - one of the most fundamental components of our democracy - simply due to a lack of financial means.

Recommendations:

2. Grata Fund recommends that the Commonwealth government amend Part IIB Division 2 of the *Australian Human Rights Commission Act 1986* (Cth) so that parties in discrimination matters must bear their own costs unless an exception applies.
3. Grata Fund recommends that if a human rights act is introduced at the federal level, the Federal Circuit Court, Federal Court and High Court should be no cost jurisdictions for matters arising under the human rights act. Parties accessing these courts for disputes under the human rights act should only be ordered to pay the costs of the other side if an exception applies:

⁹ Australians occasionally attempt to use crowdfunding platforms to raise funds for legal fees, disbursements and/or adverse costs. However, crowdfunding platforms only pay out funds if users hit their predetermined fundraising target. As the quantum required for litigation funding is typically very high and potential donors are often nervous about the legitimacy of the legal cause, these campaigns are usually unsuccessful.

While several legal-specific crowdfunding platforms have been developed both locally and globally, most have struggled to take off due to a range of factors including the complexity of and resources required to drive successful crowdfunding campaigns, and the low margins relied on by platforms to maintain operations (typically 5% of completed fundraising campaigns).

CrowdJustice, based in the UK and US, is currently the most sophisticated crowdfunding platform available for legal causes. However, it is currently unavailable in Australia and the organisation has indicated that it is unlikely to expand into Australia any time soon due to its relatively small market.



- if the party instituted the proceedings vexatiously or without reasonable cause; or
- if one party causes the other party to incur costs by an unreasonable act or omission.

Conclusion

We encourage the AHRC to address the issue of removing adverse cost barriers in human rights matters as a priority in its consideration of how human rights should be protected in Australia. Removing the risk of adverse costs will allow public interest litigants to pursue meritorious matters and contribute to a greater human rights culture by increasing access to justice through enabling disputes under a national human rights act to be heard.

Please don't hesitate to contact us at isabelle@gratafund.org.au and maria@gratafund.org.au should you wish to discuss our submission.

Sincerely,

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