14 April 2023

Attorney-General's Department
Submitted Online

Submission - Review into an appropriate costs model for Commonwealth anti-discrimination laws

About WEstjustice

WEstjustice is a community legal centre providing free legal help, financial counselling and support to people in the Western Suburbs of Melbourne. Our community is one of the fastest growing areas in Australia and is highly diverse, comprising many newly arrived refugee and migrant communities, with significant representation from Asia, Africa and the Pacific Islands and a growing Aboriginal and Torres Strait Islander community.

WEstjustice has provided legal advice and assistance to workers and job-seekers experiencing discrimination and sexual harassment since 2014, and welcomes the opportunity to provide feedback on the issues covered in the consultation paper released as part of the Attorney-General's Department review into an appropriate costs model for Commonwealth anti-discrimination laws.

We regularly advise clients about the costs-implications of selecting the Commonwealth anti-discrimination jurisdiction and welcome changes that would bring certainty about when costs are (or are not) payable, which will ensure people experiencing sexual harassment and discrimination can access legal representation, and which will support those people coming forward without the risk of becoming bankrupt or having a huge debt due to legal costs awards.

Asymmetrical Cost Model ("Equal Access" cost model)

WEstjustice supports the Equal Access cost model subject to the conditions discussed below.

A major barrier faced by our clients who have experienced discrimination and sexual harassment is the risk of having to pay adverse costs. While WEstjustice offers a free legal service to victims of sexual harassment and discrimination, we acknowledge that community legal centres such as WEstjustice do not have the capacity to assist all victims of sexual harassment and discrimination. This means no win/no fee firms and private legal practitioners should be incentivised to support workers to bring claims pertaining to sexual harassment and discrimination.

Therefore, we support a model where the Applicants can recover the cost of their case. This means if the Applicant wins they are not left out of pocket, and their legal representation is financially viable and accessible.

We note that there have been multiple reiterations of the Equal Access cost model:

- **Option 1**: Equal Access cost model as stipulated in the Consultation Paper

This cost model allows people who experience discrimination and sexual harassment to recover their legal costs if successful. If unsuccessful, Applicants would not be required to pay the other side's costs, unless the Applicant had acted vexatiously or unreasonably in commencing the proceedings or in the way they conducted themselves during proceedings.

- **Option 2:** Equal Access cost model as described by the Power to Prevent Coalition

This cost model allows people who experience discrimination and sexual harassment to recover their legal costs if successful. If unsuccessful, Applicants would not be required to pay the other side's costs, with some limited exceptions such as for vexatious litigation. This model is similar to costs protections already available in whistleblowing law.

WEstjustice is in favour of Option 2 for the reasons outlined in the Power to Prevent Coalition Joint Statement, which we are a signatory.

We consider that people who bring sexual harassment or discrimination claims under Commonwealth anti-discrimination laws should not be required to pay the other parties' costs except in very limited circumstances. Namely, if their claim is vexatious or they have brought the claim without proper basis or reasonable cause (see e.g. section 570(2)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**)).

However, we do not consider that costs should be awarded in circumstances where the Applicant allegedly acted "unreasonably" in commencing the proceedings or in the way they conducted themselves during proceedings (see e.g. section 570(2)(b) of the FW Act), as proposed in Option 1 in the Consultation Paper.

There is jurisprudence in the Fair Work jurisdiction about the term "unreasonableness" in relation to section 570(2)(b) of the FW Act. Even though the provisions have existed for some time, the decisions provide limited guidance on what is considered unreasonable, which raises uncertainty about when it will apply. This can act as a disincentive to bring claims.

The jurisprudence in relation to section 570(2) has established that a rejection of a Calderbank offer can amount to an act of unreasonableness (see, eg, *Adamczak v Alsco Pty Ltd* (No.4) [2019] FCCA 7 [138]-[139]). In *Melbourne Stadiums Ltd v Sautner* (2015) 229 FCR 221; 247 IR 74; [2015] FCAFC 20 the Full Federal Court stated at [166] that "[i]t is well established that a failure to accept a reasonable offer of compromise may constitute an unreasonable act". However, beyond this, the term is subject to a wide degree of judicial discretion. We do not advocate for wide judicial discretion in this area. It is not the most beneficial way to regulate whether costs are awarded or not.

Further, in cases where there is a victim of sexual harassment or discrimination, the Applicant may suffer from mental health concerns, which may compromise their ability to assess the reasonableness of an offer. An Applicant from a disadvantaged background may not have appropriate legal representation to decide as to the "reasonableness" of an offer. Often "reasonableness" is assessed with the benefit of hindsight at the conclusion of a trial or an

interlocutory application. This is an unfair burden to be placed on an Applicant, who may already be experiencing significant trauma.

If Option 1 is adopted, WEstjustice considers that "unreasonableness" will need to be sufficiently defined to apply in limited circumstances to avoid the above concerns.

Right to set aside cost order

In addition to Option 2, WEstjustice further proposes that an individual Respondent (i.e. a natural person) against whom a cost order is made is given the opportunity to apply to set aside a cost order if it is in the interest of justice to do so.

It is proposed the matters that the court may consider in setting aside a cost order be limited to a select few circumstances set out below. Otherwise, there is a risk that the certainty as to cost recovery for Applicants as proposed by the Equal Access cost model will be diluted.

In considering whether it is in the interests of justice to set aside a cost order, WEstjustice proposes that the court be limited to considering the following matters:

- The seriousness and gravity of the Respondent's conduct towards the Applicant;
- Any mitigating circumstances of the Respondent (e.g. age, disability and financial circumstances); and
- Vulnerabilities of the Applicant (e.g. impact of the unlawful conduct on them and their financial circumstances).

This proposal is intended to address an unlikely case where a low-level conduct could result in a disproportionate cost order against an individual Respondent, who may have their own vulnerabilities or be experiencing disadvantage. Any amendment to the legislation should note this to be the intention to avoid a broad application of the right to set aside a cost order.

Please contact me if you have any questions or would like to discuss our submission – jennifer@westjustice.org.au.

Yours sincerely

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