

13 April 2023

Mark Dreyfus KC
Attorney General
4 National Circuit
BARTON ACT 2600
Via: respectatwork@ag.gov.au

Dear Attorney General,

RE: REVIEW INTO AN APPROPRIATE COST MODELS FOR ANTI-DISCRIMINATION MATTERS

The Young Workers Centre (YWC) welcomes the opportunity to make a submission on the proposed costs model for Commonwealth anti-discrimination matters.

Since its founding in 2016, the YWC, based at Victorian Trades Hall Council (VTHC) has provided workplace rights training to over 42,000 young workers in secondary schools and TAFEs. We run a community legal centre that provides free legal advice and representation to young workers aged 30 and under in Victoria. Since 2016, we have recovered over \$2 million in compensation for over 2,400 young workers. We also support young workers to run campaigns to improve their workplaces. Most notably, young workers have won wage theft laws and an Apprenticeship Taskforce in Victoria from their campaigning.

In the period of 2021-2022, YWC spoke with a total of 375 young workers. YWC offered ongoing legal assistance to 73 workers and provided once-off advice or referrals to 302 workers. In the same period, 15% of our ongoing matters related to equal opportunity complaints.

Whilst we support young workers under the age of 30, most of our clients are between the ages of 19 and 26. Of those who come to the YWC for legal assistance 45% are in casual employment, and 55% are in low wage industries, such as hospitality and retail.

The YWC's small team of lawyers (less than 5) have provided support to 91 victim/survivors of workplace sexual harassment between 2020-2023. A further 37 workers who requested ongoing assistance from YWC with sexual harassment matters were provided with general advice and/or referred to other services. Sexual harassment matters are resource intensive and emotionally arduous, and of those that YWC have provided ongoing assistance, nearly half have withdrawn for various reasons. Many young workers told YWC solicitors that their matter was too taxing on their mental health, that reliving the experience was deeply distressing, and that they feared the outcomes of proceedings.



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The asymmetrical cost/ equal access model must be implemented in discrimination matters to level the playing field for young workers who are victim/survivors of workplace sexual harassment/discrimination.

This cost model is the only model that acknowledges the inherent power imbalances and barriers to justice faced in discrimination cases. Victim/survivors of sexual harassment should be able to seek justice without the fear of financial penalty.

This submission shares just some of the stories of victim/survivors of sexual harassment who have contacted YWC, as well as case studies highlighting the way employers use cost threats to intimidate young workers out of pursuing their genuine legal claims.

This submission is intended to be read in conjunction with the submissions made by the Victorian Trades Hall Council (VTHC) and the Australian Council of Trade Unions (ACTU), as well as any other affiliated unions.

Carly*, supermarket worker:

Carly was a supermarket cashier who was sexually harassed and assaulted by her team leader. The harassment had a long-term mental health impact and has seriously affected her ability to continue working in a retail environment. YWC solicitors represented Carly with an equal opportunity claim, which resolved at mediation.

Jean*, disability support worker:

Jean was a disability support worker who was sexually assaulted by a patient she was providing home care to. YWC offered legal assistance with drafting and representing Jean before the Victorian Equal Opportunity Commission for an equal opportunity claim. YWC initiated the process by drafting a witness statement. Ultimately, Jean was re-traumatised by the process of going through the witness statement and chose not to continue her case.

Malia*, assistant:

Malia was an assistant at a small business. She was sexually harassed by her supervisor. She made a complaint, which was not resolved. YWC assisted Malia in filing an equal opportunity claim. Malia became increasingly distressed as the mediation date approached, and ultimately chose to withdraw her claim.

The asymmetrical costs model supports victim/survivors in accessing justice in a system geared against them. Young worker victim/survivors deserve their day in court. The victim/survivors who make sexual harassment/discrimination claims should have confidence that their financial capacity will not limit their ability to pursue justice.

There have been countless instances where young workers assisted by YWC have been strongarmed by well-resourced employers, and intimidated into dropping their claims, and a common tactic used by employer respondents includes issuing a cost threat.

Yichen

Yichen came to the Young Workers Centre in 2022 as a young retail worker. He worked part time while he was undertaking university studies and was soon to take a period of leave while he undertook a placement. Just before his placement was due to start, he realised his employer had not been paying his superannuation. This made Yichen extremely distressed, and he felt taken advantage of by his employer.

Yichen wrote to his employer and asked them to pay back his superannuation, requesting they do so immediately. In response, his employer sent back a threatening email and said Yichen was not to come back to work until the matter was resolved. In the circumstances, Yichen took that to mean his employment was terminated.

Yichen sought the help of the Young Workers Centre, who represented him before the Fair Work Commission in a general protections matter. During the conciliation, the employer categorically refused to settle, claiming a jurisdictional objection on the basis that Yichen had not been dismissed. After the conciliation, Yichen decided to withdraw his general protections dismissal matter, but wanted to proceed with a non-dismissal adverse action claim.

After the matter was withdrawn, the employer submitted a costs application against Yichen and against the Young Workers Centre solicitor representing him. The Young Workers Centre made private representations to the employer's solicitor in order to resolve the cost matter that Yichen had a fair legal question that needed hearing, yet the employer refused to withdraw.

Ultimately, the cost application against Yichen and YWC went to trial where the application was struck down. The experience, however, was intimidating to Yichen as a young and migrant worker. He felt too scared to continue to pursue his general protections matter, despite YWC solicitors remaining of the view that he has a genuine legal case to be heard. Yichen's unpaid wages matter and general protections (non-dismissal) is ongoing.

Rachel*

When Rachel came to the Young Workers Centre in 2021, she was a 21-year-old hospitality worker, working part time in a busy city restaurant to pay her

rent whilst studying. She'd applied for the job through the recommendation of a friend.

During her time at the restaurant, a relationship had developed between Rachel and Daniel, a staff member who worked behind the bar. After 6 months, the relationship broke down and the abuse started.*

Daniel harassed, threatened, and assaulted Rachel. Daniel verbally harassed Rachel at work, even in front of other colleagues, he'd threatened to expose their sexual encounter to her family and friends on social media, and he'd made many attempts to gaslight her into believing that she'd made the allegations up. Daniel went on to physically assault Rachel.

These encounters had a massive impact on Rachel's mental health, eventually leading to a severe mental health breakdown. Rachel hasn't worked in the three years since the physical assault.

She'd made reports about Daniel's behaviour to her employer after each harassing incident, but they did nothing to intervene. Their failure allowed for the escalation that ultimately resulted in the assault. Had they done something to protect Rachel, she may be in a better situation today.

Rachel lodged a formal sexual harassment complaint against her employer for failing to act, and against Daniel for the abuse.

Daniel, the perpetrator, made a costs threat prior to mediation. He asserted vexatiousness, that the report was revenge for the end of the relationship, and refused to negotiate with the Young Workers Centre unless total confidentiality was one of the settlement terms.

Unfortunately for Rachel, the burden of retelling her story, the demands for her secrecy, the uncertainty of the judgement, and the risk of adverse costs against her were too much. She dropped the case and is unlikely to ever work again.

** Names have been changed to protect victim/survivors' confidentiality.*

Ensuring young workers have access to the justice system is vital to reducing inequality and protecting their rights. The asymmetrical costs/ equal access model is the only model that acknowledges the inherent power imbalance within the justice system, and provides greater faith in the process.

Young workers must never be subjected to the same abuse of power that Yichen and Rachel were. It is time to introduce a cost model that supports young worker victim/survivors of workplace sexual harassment.

The Young Workers Centre thanks the Albanese Government for the opportunity to provide our feedback on the proposed changes to the cost model in federal anti-discrimination cases, tried through the Human Rights Commission.

Should you wish to discuss anything further with me, please do not hesitate to reach out at fsowerbutts@vthc.org.au.

In solidarity,

A handwritten signature in black ink, appearing to read 'F. Sowerbutts', with a horizontal line drawn through the middle of the signature.

Felicity Sowerbutts

Director

Young Workers Centre