PILCH

Public Interest Law Clearing House

Submission to the New South Wales Law Reform Commission:

Inquiry into Security for Costs and Associated Costs Orders

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PUBLIC INTEREST LAW CLEARING HOUSE (PILCH NSW)

PILCH NSW is a membership based organisation that was formed in 1992. PILCH NSW aims to bridge the justice gap by linking individuals and not for profit organisations with legal and other professional advisors to address public interest issues in the community. In addition to this core role, PILCH NSW also provides advice, coordinates projects to create systemic change and hosts events to raise awareness about public interest matters.

PILCH NSW receives, assesses and refers requests for pro bono assistance from members of the public and not-for-profit organisations. Referral requests are assessed against PILCH's public interest criteria. PILCH interprets the term, "public interest" to include issues that impact the disadvantaged, the vulnerable and marginalised groups or raise matters of broad public concern.

PILCH NSW is a trusted pro bono clearing house which engages with key referral agencies such as Community Legal Centres, Law Access NSW, Legal Aid Commission and not-for-profit organisations.

1.1 PILCH NSW aims to bridge the justice gap by:

- Providing the community with access to pro bono legal representation and other professional service to enable pursuit of important legal and social issues that would otherwise go unaddressed.
- Developing and coordinating projects which respond to unmet legal need and which address systemic issues.
- Forming partnerships which encourage and facilitate the clinical training of future lawyers by offering law students volunteering, coursework and internship opportunities.

Funding is sourced from annual membership fees supplemented by a grant from the NSW Public Purpose Fund and PILCH NSW fundraising efforts. A Board of Directors guides management of the organisation. PILCH NSW is part of a grouping of State based PILCH's including Vic PILCH, Q PILCH and Justice Net SA in the states of Victoria, Queensland and South Australia respectively.

1.2 Access to justice

Socially and economically disadvantaged members of the community can at times fall short of the requirements set by Legal Aid, which is assessed against one or more of the following:

- means test;
- merit test;
- availability of funds;
- contributions;
- areas of law - criminal, family, civil (including public interest human rights).

Legal aid is not available to members of the community, where it involves:

- matters about damage to any property by a motor vehicle;
- proceedings under the *Confiscation of Proceeds of Crime Act 1989* (NSW) and other legislation relating to tainted moneys/property;
- proceedings under the *Proceeds of Crime Act 1987* (Cth); or
- a defendant who is objecting to a Preliminary Order for restitution under s47 the *Victim's Support and Rehabilitation Act 1996* (NSW).

Access to justice can foster social inclusion within communities and address historical and ongoing inequality.

In the words of Sir Anthony Mason AC KBE:

> *"It is fundamental to our democracy and to our notion of law that all who require it should have access to justice."*

Disadvantaged and marginalised members of our community are often faced with serious legal problems. These legal problems often arise as a result of their vulnerability in areas such as predatory lending, discrimination, stolen wages, unlawful detention and environmental preservation. All of these issues are matters of broad public concern.

Not-for-profit organisations in our community that serve the vulnerable are also in need of pro bono legal assistance. These organisations notoriously suffer from a lack of adequate funding and resources. It is imperative for the survival of these services that legal, accounting and other professional advice is accessible on a no cost basis.

PILCH NSW assists both individuals and not-for-profit organisations to obtain assistance and advice from PILCH members on a no cost basis. In essence, PILCH NSW bridges the justice gap where these groups and individuals are unable to afford assistance or when assistance is otherwise unavailable in public interest matters.

2 INTRODUCTION

2.1 PILCH NSW makes the following submissions regarding the terms of reference numbered 126, Security for Costs and Associated Costs Orders, which provide:

i) pursuant to section 10 of the Law Reform Commission Act 1967 (NSW), the Law Reform Commission is to inquire into and report on whether the law and practice relating to security for costs and to associated orders, such as protective costs orders and public interest orders, strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim regardless of their means against ensuring that a defendant is not unduly exposed to the costs of defending that litigation. In undertaking this review, the Commission is to consider in particular whether or not the law and practice:

> *a) is consistent with modern notions of access to justice;*
>
> *b) adequately takes into account the strength of the plaintiff's case and whether the litigation is in the public interest;*
>
> *c) applies satisfactorily in the case of incorporated plaintiffs, impecunious plaintiffs, self-represented litigants, and plaintiffs who are supported by legal aid;*
>
> *d) operates appropriately where solicitors are acting on a speculative fee; where parties are funded by third parties; in representative proceedings; and in cross-border litigation;*
>
> *e) contains adequate procedures for making and determining applications for relevant orders - for example, in respect of timing, and in respect to their expeditious and efficient disposition; and*
>
> *f) requires any modifications in respect of appeals; and*

ii) the Commission is also to consider whether the Uniform Civil Procedure Rules 2005 in relation to Security for Costs and associated orders are adequate, and any related issue.

2.2 These submissions also refer to:

- The Australian Law Reform Commission's (**ALRC**) 1995 report titled, *Costs Shifting - who pays for litigation*, in particular chapter 11 regarding capping costs, chapter 13, *Public interest costs orders* and chapter 19 regarding security for costs;
- Submissions by Public Interest Advocacy Centre Ltd (**PIAC**) dated 5 March 2010;
- Submissions by the National Pro Bono Resource Centre, February 2010; and
- Submissions by the Law Institute of Victoria (**LIV**) dated 26 February 2010.

3 CURRENT LAW ON COSTS ORDERS

3.1 The common law position for the granting of costs orders is that it is just and reasonable that the party who has caused the other party to incur the costs of the litigation should reimburse that party for the liability incurred. Costs are compensatory, not punitive. Costs are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings: *Latoudis v Casey* [1990] HCA 59.

3.2 This position is encapsulated in Rule 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) which states, in part:

> *...if the court makes any order as to costs, the court is to order that the costs follow the event...*

3.3 The term, "costs follow the event" infers that costs orders, if any, are granted after the proceedings. The common law position (affirmed by statute) creates uncertainty because it is difficult for potential litigants to assess the financial risk of initiating proceedings.

3.4 Costs are a deterrent to the pursuit of public interest matters and enforcing rights, especially where matters involve a new or unresolved area of law. The possible exposure to costs is a barrier to accessing justice for the marginalised and vulnerable members of the community. Claims are not brought or are abandoned due to the risk of adverse costs orders.

3.5 PILCH submits that a clear and defined legal framework is required in order to encourage the commencement of matters that are in the public interest, that consider a new or uncertain area of law and or require pro bono representation.

4 PUBLIC INTEREST COSTS ORDERS

4.1 There is no clear legal definition of public interest. Legislation is silent and case law ambiguous. The courts have provided little consistent guidance as to the likelihood of a public interest matter attracting a no costs order. Judicial interpretation of what matters would fall within the realm of public interest remains unclear.

4.2 In *Oshlack v Richmond River Council* [1998] HCA 11 the High Court restored the order of Stein J at first instance, that there be no order as to costs. However, the Court also criticised the factors that Stein J used to support his findings. McHugh J at 74:

> *His Honour's [Stein J] judgment does not refer to any principle or criterion which would enable other courts to determine why the matters that he mentioned made the case "public interest litigation". Nor does he refer to any principle or criterion that would enable other courts to distinguish this case from prosecutions, and constitutional and administrative law matters that are matters of public*

controversy in which there is a public interest in the outcome of the litigation or which involve an analysis of statutory provisions which should prove helpful in other cases.

Without an organising principle to apply or a set of criteria to guide, there is a real danger that, by invoking the "public interest litigation" factor in cases that affect the public interest or involve a public authority, an award of costs will depend on nothing more than the social preferences of the judge, a dependence that will be masked by reliance on the protean concept of public interest litigation.

4.3 To date, what constitutes public interest has been left to judicial discretion and assessment on a case by case basis. The uncertainty of this discretion is a barrier to members of the community pursuing meritorious claims.

4.4 The ALRC 1995 Report notes that the judiciary have provided some guidance as to how public interest is determined. The following have been identified:

(a) where it affects the community or a significant sector of the community;

(b) in matters that involve an important question of law;

(c) in cases involving issues of national security;

(d) in cases concerning the efficient and fair administration of justice; and

(e) in test case proceedings.

The ALRC 1995 Report supports an application of the above principles in recommendation 45 which states that a court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that:

- the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community;
- the proceedings will affect the development of the law generally and may reduce the need for further litigation; or
- the proceedings otherwise have the character of public interest or test case proceedings,

notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.

PIAC's submissions dated 5 March 2010 highlight the need for a statute-specific approach for defining public interest. PILCH NSW submits that approach would be beneficial and recommends that a new costs rule provide a presumption in favour of no order for costs in public interest matters.

PILCH NSW supports the ALRC's recommendation and PIAC's submission. PILCH NSW agrees that by codifying the definition of public interest there will be greater clarity as to the issue of costs allowing potential litigants to be aware of the likelihood of financial loss before starting proceedings.

If a new cost rule provides a presumption in favour of no order for costs in public interest matters, the burden would then be shifted to the other party to prove the proceedings were not in the public interest.

PILCH NSW considers the need for a clear definition of public interest to be of paramount importance in the making of public interest costs orders.

4.5 Terms of public interest costs orders

PILCH NSW supports the ALRC 1995 Report's recommendation 47 which provides:

> *If the court or tribunal is satisfied that there are grounds for it to make a public interest costs order, it may make such orders as to costs as it considers appropriate having regard to:*
>
> - *the resources of the parties;*
> - *the likely cost of the proceedings to each party;*
> - *the ability of each party to present his or her care properly or to negotiate a fair settlement;*
> - *the extent of any private or commercial interest each party may have in the litigation.*

4.6 Timing of public interest costs orders

The ALRC 1995 Report recommends (recommendation 49) that:

> *The court or tribunal may make a public interest costs order at any stage of the proceedings including at the start of the proceedings.*

PILCH NSW submits that the existing common law position of costs following the event be maintained. However, PILCH NSW strongly encourages Courts to depart from this common law rule in appropriate public interest circumstances. PILCH NSW further submits that such cost orders ought to be made at the earliest possible stage of the proceedings in order to remove risk and uncertainty.

5 COSTS CAPPING

5.1 The power to cap costs already exists at both state and federal level.

Order 62A of the *Federal Court Rules (Cth)* provides that:

> *(1) Where a party is awarded judgment for less than $100,000 on a claim (not including a cross claim) for money sum or damages any costs ordered to be paid, including disbursements, will be reduced by one third of the amount otherwise allowable under this Order unless the Court or a Judge otherwise orders.*

Though an Order 62A costs order may reduce some uncertainty regarding the risk of adverse costs orders, the uncertainty is only reduced at judgment. Parties still face the uncertainty at the outset and throughout the proceedings, particularly where damages or the recoverable sum cannot be determined at the early stages. The reduction by one third is arbitrary, without consideration of relevant factors. The relief Order 62A offers dissipates if judgment is more than $100,000, where it reverts back to the court's discretion to make such costs orders as it deems fit.

5.2 In New South Wales, Rule 42.4 of the UCPR provides the power to order maximum costs, not limiting judgment sum to $100,000:

> *(1) The court may order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.*
>
> *(3) An order under subrule (1) may include such directions as the court considers necessary to effect the just, quick and cheap:*
>
> *(a) progress of the proceedings to trial or hearing, or*
>
> *(b) trial or hearing of the proceedings.*
>
> *(4) If, in the court's opinion, there are special reasons, and it is in the interests of justice to do so, the court may vary the specification of maximum recoverable costs ordered under subrule (1).*

Rule 42.4 lacks clear grounds or criteria for determining what costs are recoverable to assist the court to make an order as to maximum costs.

PILCH NSW submits existing costs capping framework should be widened to deal with public interest costs orders and pro bono work.

5.3 In *Blue Mountains Conservation Society Inc. v Delta Electricity* [2009] NSWLEC 150 Pain J considered the following to determine whether or not to grant the protective costs order, capping maximum costs at $20,000:

- *timing of the application;*
- *whether claim appears arguable;*
- *whether public interest litigation;*
- *whether plaintiff has private interest;*
- *continuation of proceedings;*
- *counsel acting pro bono;*
- *parties' financial means; and*
- *whether rewarding inefficient litigation.*

These factors are by no means exhaustive, Pain J looked to what the Federal Court considered as relevant factors in *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864:

- *timing of the application;*
- *the complexity of the factual or legal issues raised in the proceedings;*
- *the amount of damages that the applicant seeks to recover and the extent of any other remedies sought;*
- *whether the applicant's claims are arguable and not frivolous or vexatious;*
- *the undesirability of forcing the applicant to abandon the proceedings; and*
- *whether there is a public interest element to the case.*

5.4 PILCH NSW supports the ALRC 1995 Report's recommendation 39 that:

> *A court or tribunal should be able to specify, by order made at a directions hearing, the maximum amount that may be recovered pursuant to an order for costs. An amount that a party is ordered to pay pursuant to a disciplinary costs order is in addition to the maximum amount specified by the court or tribunal.*

5.5 The ALRC also recommends (recommendation 48):

> *When considering the 'resources of the parties' the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties to pay an adverse costs order is being affected in whole or part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.*

5.6 PILCH NSW supports establishing clear criteria for determining maximum costs or capping costs to enable parties to prepare sufficient evidence to assist the court's assessment and determination for an efficient costs order. Deciding on costs at the outset of proceedings allows awareness of risks early on.

PILCH NSW submits that once proceedings are found to be in the public interest, a public interest cost order should be forthcoming. Where an order for no costs is not granted or not available, the litigants should have costs capped.

6 LAWYERS AND PERSONAL COST ORDERS IN PRO BONO PROCEEDINGS

6.1 The indemnity principle and its affect on practitioners acting in pro bono capacity

PILCH NSW submits that the application of the indemnity principle has significant adverse affects upon lawyers acting in a pro bono capacity for their clients. It is well settled that the law presumes that costs will follow the event and generally will be assessed on ordinary basis. The order for costs is one of a compensatory nature known as the indemnity principle. That is to say that an award for costs is primarily based on the necessity for a client to pay for his lawyer's services. There is an ancillary aspect to the use of cost orders in that adverse cost orders will also act as a deterrent to litigation and may precipitate settlement discussions for fear of cost implications.

The nature of the relationship between solicitor and client deprives pro bono litigants the advantage of obtaining a costs order against another party or alternatively to utilise the potential for an adverse costs order to negotiate a successful resolution of their claim, defence or other interest in their proceedings. Law reform is required to balance this inequity and distinguish between parties that are acting pro bono and those acting on conditional or no win / no fee costs agreements.

The inequity is further compounded when court appointed pro bono referral schemes are afforded in the Federal Magistrates Court and Supreme Court of NSW for an advocate to recoup from an unsuccessful party the amount of any costs recovered through a costs order. However lawyers acting from other pro bono referral schemes may not obtain this same advantage. The differentiation between a court appointed or external pro bono referral scheme is limited at best. There is little factual basis for the different positions to be applied. PILCH NSW submits that this position should be reformed.

6.2 Lawyers and personal costs orders in pro bono proceedings

As discussed above, there are significant policy considerations that support the promotion of pro bono legal services and the participation of the legal profession in providing pro bono legal services. Indeed, pro bono legal services on their own may only provided limited access to justice for the community as a whole.

The costs regime as it currently applies places a deterrent upon practitioners entering into litigation on a pro bono basis. This is because the current statutory regime allows costs orders to be made against legal practitioners personally. This is clearly a major disincentive for practitioners to undertake legal work in a circumstance where they may be personally liable.

There is some distinction between the personal costs orders that may be made pursuant to the Legal Profession Act 2004 (NSW) (**LPA**) section 348 and the Civil Procedure Act 2005 (NSW) (**CPA**) section 99. The LPA provides for its costs orders in circumstances where a practitioner who has provided legal services to a party without "reasonable prospects of success", whereas the CPA refers to costs incurred by (ss(1)(a)) "serious neglect, serious incompetence or serious misconduct" or incurred (ss(1)(b)) "improperly or without reasonable cause, in circumstances for which a legal practitioner is responsible."

The submission to follow will deal largely with the provisions within the LPA, as opposed to those within the CPA. Personal costs orders as against practitioners for serious neglect, incompetence or misconduct may, as the specific circumstances of that case dictate, be justified.

The CPA provides discretion to the court for costs that are incurred "improperly or without reasonable cause". This can be construed as being within the general scope of costs orders the court may make pursuant to the LPA for proceedings commenced without reasonable prospects of success. Therefore, we submit that the concerns of PILCH NSW apply to both the LPA and CPA. Accordingly, any change that is effected in one Act must also be effected in the other to maintain consistency and a clear legislative intention.

PILCH NSW submits that the ability of the court to make personal costs orders against a legal practitioner ought to be exempt in cases where a solicitor is acting on a pro bono basis.

There are significant policy considerations for the advancement of pro bono work as discussed above. The legislature and judiciary should be encouraging policies that allow members of the community to litigate in pursuit of justice. The cost of litigation is prohibitively high to many litigants and can prevent access to justice.

Giving the court the power to make costs orders against legal practitioners acting in a pro bono capacity runs counter to the reasoning behind the introduction of the CPA, LPA and, more generally, to reforms of case management. This reduces the access to justice by making pro bono solicitors subject to and fearful of personal liability where they are not receiving any financial gain.

Given that under both the LPA and CPA the court retains a discretion to not order such costs, the legislation ought to be amended to reflect the benefits of public interest litigation and solicitors acting pro bono. That is to say, PILCH NSW submits there should be an inclusion of a specific exemption for solicitors that are either acting pro bono or in public interest litigation.

6.3 Indemnity fund

An important form would be to establish an "indemnity fund" that may partially or wholly indemnify pro bono and or public interest litigants in appropriate cases.

The fund could be funded by adverse cost orders against litigants that are unsuccessful against litigants who are represented pro bono.

Although this may not be specifically within the reforms to be considered by the Commission, it is a proposal that ought to be given some consideration and in the submission of PILCH NSW, is a viable solution to many issues facing public interest and pro bono litigants.

7 SECURITY FOR COSTS

7.1 An order for security for costs aims to ensure those who stand to benefit from the litigation also run the risk of its burdens.

The ALRC 1995 Report stated that although there is increasing support to make available security for costs orders, increasing its availability also creates a litigation barrier.

7.2 PILCH NSW considers that in public interest proceedings:

(a) a presumption against a security for costs order would be beneficial;

(b) where a security for costs order is made, the costs be capped in accordance with clear criteria; and

(c) where the litigant is exposed to a security for costs order, whether capped or not, the security should be accessed from the indemnity fund.

7.3 PILCH NSW considers that in pro bono matters, that fall short of the public interest definition and public interest litigation criteria:

(a) a presumption against personal costs orders against the pro bono practitioner;

(b) where a personal costs order is made against the pro bono practitioner, the costs be capped in accordance with clear criteria; and

(c) where the pro bono practitioner is exposed to a personal costs order, whether capped or not, the costs should be borne from the indemnity fund.

PILCH NSW considers the importance of continuing and promoting access to justice by improving certainty in public interest litigation and pro bono representation.