

5 October 2022

Attorneys-General
Review of Model Defamation Provisions
Via CommunityRightsLawReform@justice.vic.gov.au



Dear Attorneys-General,

Victorian Trades Hall Council welcomes the proposed policy options put forward by the Review into Model Defamation Provisions, but argues that the proposed options do not go far enough to reverse the chilling effect that exists as a result of the perpetual threat of defamation on people trying to pursue justice.

The policy options put forward by the Review expand on the scope of absolute privilege to cover reports made to police and investigatory bodies, but what is left out is a proposal on how to address the wider and more pervasive worry that the threat of defamation has on comments made in the public sphere.

Further, after consultation with industrial officers and legal professionals, VTHC is of the view that current defamation provisions have the potential to clash with a person's legal rights under other legal instruments, including in the Equal Opportunity Act 2010 (Vic) and the Fair Work Act 2009 (Cth). The initial consultation of the Review and the proposed policy options also fail to address this concern.

Defamation provisions must be overhauled to place a greater onus on the person alleging defamation to prevent it from becoming a tool that allows them to shirk obligations and responsibilities towards another person in other areas of the law.

Chilling effect of defamation on civil society and industrial activities

VTHC welcomes the extension of absolute privilege to reports made to police and investigatory bodies and the considerations made to professional disciplinary bodies. However, VTHC urges the Review to consider more broadly the harm of the threat of defamation to the exercise of rights in the public arena (news media, social media and public spaces).

The trade union movement's strength has been built on the ability for workers to come together to share their experiences at work, in order to collectively work towards improved workplace rights and conditions. This ability to talk about personal experience is fundamental to democratic industrial activity. It is also fundamental to the activities of any civil society group with an interest in a collective issue. However, this basic freedom is significantly threatened by the possibility of defamation proceedings on imputations that may be made while sharing these stories.

This is particularly concerning as workers do not have control over other people's behaviour as a result of imputations made when workers share their experiences at work. Under current defamation provisions, a worker sharing their personal experience with their employer on social media, at a public

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community action, or even with a friend could be vulnerable to a case of defamation simply for sharing their story. It is unreasonable to make a worker responsible, for example, for a Facebook friend's choice to avoid the worker's workplace as a result of the worker sharing their experiences from working there. It is also unreasonable to continue to expose workers to the threat of defamation proceedings in a democratic society where working people need to share their stories with one another in order to participate in the legitimate industrial activity that underpins our industrial relations system. Current defamation laws are ill-equipped to deal with these aspects of our industrial relations system. Indeed, current defamation provisions actively undermine the functioning of civil society.

It is crucial for workers to be able to share stories and experiences at their workplace without fear of being threatened with defamation proceedings by their employers. Yet recent cases of defamation have had a chilling effect on public debate and collective action, as employers and people in power increasingly use it as a tool to silence detractors.

This is why VTHC advocates to amend defamation provisions to ensure that truth can be used as an absolute defence against claims of defamation, to ensure that working people can truthfully share their experiences with others in legitimate public forums.

Threat of defamation proceedings as adverse action

The chilling effect of current defamation provisions reaches beyond public action. It also poses serious challenges to the enforcement of rights and entitlements guaranteed by other pieces of legislation. The impact is not just on culture, but the integrity of the law too.

Industrial officers and solicitors have told VTHC that workers need greater protection against defamation when they are in the course of enforcing or enquiring about their workplace rights, including their right to safety from gendered violence. Industrial officers and solicitors have told VTHC that, as a direct result of an employer's threat to commence defamation proceedings, workers enforcing their entitlements have either not wanted to proceed in their case entirely or have delayed taking action for fear of reprisal.

Defamation provisions, under current laws and the proposed policy options, leave important and legitimate rights (such as workplace rights and rights to be free from discrimination) less viable for everyday people to enforce or defend, if the threat of defamation proceedings constantly looms.

Commencing or threatening legal proceedings for defamation is a type of retaliatory behaviour, suppressing people's abilities to legitimately get redress for injustice. Solicitors and industrial officers have told VTHC that this is a retaliatory action often used by employers in response to being served letters of demand or asked to cooperate with a legal matter regarding a worker.

A worker may have legitimate grounds and extensive evidence to enforce or enquire about a workplace entitlement withheld by the employer, but they

would still be vulnerable to the commencement of defamation proceedings against them if they spoke about their consideration or intention to begin any kind of process. With already limited resources, threats of defamation mean workers are discouraged from asking about or talking about their rights and entitlements. In effect, this is a threat of adverse action for exercising their basic rights.

While the proposed policy option of expanding absolute privilege to reports made to statutory bodies is welcome, workers will often need to take many other steps before they are empowered to report to such a body. For example, a worker would likely need to share their experience with their coworkers and their community before they even realise an entitlement is breached. The worker would also likely speak to a local community legal centre or trade union about their workplace problem to get assistance and advice before approaching an investigatory body. None of these steps would be covered by the proposed policy options, leaving the worker vulnerable to claims of defamation even where they are reasonably sharing their experience or gathering relevant information about their problem. The threat of commencing defamation proceedings ultimately deters people who have experienced breaches of their workplace rights or entitlements from seeking information from other people about their issue or commencing a complaints process in a way that makes sense to everyday people.

While workers are protected by the Fair Work Act 2009 (Cth) from adverse action and coercion from their employer in retaliation to their exercise of workplace rights and right to industrial activity, threatening to commence defamation proceedings is a type of retaliatory behaviour readily available to the employer that can effectively shut down all enforcement of workplace rights and entitlements, even those guaranteed by the law.

There is therefore a significant gap between the very high bar that a person has to reach in order to be protected from threats of defamation claims, compared to the very low bar that a person has to clear to bring a defamation case. This only magnifies the existing power imbalance that exists between workers and their employers.

Employers already wield significant power over workers. Many employers take retaliatory action against workers exercising workplace rights, without repercussions. For example, workers have reported that many employers reduce rostered hours, assign unpleasant duties or take unfair disciplinary action against workers exercising their workplace rights.

In addition to the power that employers already have over their worker's earnings and work conditions, the financial power that employers have to make a case more costly to a worker can be enough to scare a worker into accepting unlawful or substandard work conditions. Whenever an individual worker is forced to choose between risking a defamation lawsuit or enforcing their legal workplace entitlements, the legal instruments that underpin their workplace entitlements is undermined and loses integrity.

As such, VTHC argues that the bar to clear in order to bring a defamation case must be significantly higher to ensure that the bringing of the case is not a

retaliatory act against the potential defendant, as well as that the enforcement of other legal instruments (especially around equal opportunity, anti-discrimination, workplace safety and minimum workplace entitlements) cannot be undermined as a result.

Defamation provisions must be seriously overhauled to ensure that they do not undermine existing whistleblower protections and general protections that protect a person trying to assert their legal rights.

Recommendations:

Recommendation 1: Defamation provisions must be overhauled to place a greater onus on the person alleging defamation to prevent it from becoming a tool that allows them to shirk obligations and responsibilities towards another person in other areas of the law.

Recommendation 2: Amend model defamation provisions to ensure that truth is an absolute defence against a claim of defamation. If the imputation arises from a statement that is true, truth should be an absolute defence.

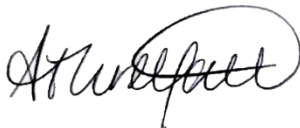
Recommendation 3: Amend model defamation provisions to require a prospective defamation claimant demonstrate that bringing the case is not retaliatory in any way, before it can proceed.

Recommendation 4: Amend model defamation provisions to require the potential claimant to demonstrate that proceeding with a defamation case would not offend the objects of any relevant pieces of legislation (such as anti-discrimination or workplace entitlements legislation) or infringe upon a human right for which a law of an Australian jurisdiction provides a remedy or complaint mechanism.

Recommendation 5: Legislate to ensure that absolute privilege is extended to reports to registered trade unions and community legal centres.

On behalf of the Victorian Trades Hall Council I thank the Attorneys for their consideration of this submission.

In solidarity

A handwritten signature in black ink, appearing to read 'Amanda Threlfall', with a large, loopy flourish at the end.

Amanda Threlfall

Assistant Secretary