14 October 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Via: legcon.sen@aph.gov.au

Dear Committee,

The Victorian Trades Hall Council (VTHC) welcomes the opportunity to make a submission to the inquiry on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022. VTHC commends the Albanese Labor Government for taking the first steps to ensuring safer workplaces for women after years of inaction by the former Coalition Government.

VTHC was founded in 1856 and is the peak body for unions in Victoria. VTHC represents over 40 unions and more than 430,000 workers in the state. These workers are members of unions that reach into every industry across Victoria, including women workers who are disproportionately exposed to sexual harassment and other forms of gendered violence in the workplace.

Since winning the Eight Hour Day in 1856, VTHC has had a long history of fighting for and defending the rights of workers to safe work conditions and protection from psychosocial risks and harms, including gendered violence. Today sexual harassment remains a systemic issue, with 39% of women and 26% of men experiencing sexual harassment at work in the last 5 years alone according to the Everyone's Business survey by the Australian Human Rights Commission.

Through consultation with affiliated unions, VTHC makes recommendations below to ensure that proposed amendments are effective in addressing sexual harassment in the workplace, using lessons learned by organisers and industrial officers in the Victorian context.

Victorian unions welcome the establishment of a positive duty on employers to prevent sexual harassment, as well as amendments to the Australian Human Rights Commission (AHRC) Act that enable representative bodies such as unions to make representative applications in federal court on behalf of people who have experienced unlawful discrimination.

However, the proposed model replicates aspects of the Victorian Equal Opportunity Act (EO Act) that have been ineffective in preventing and addressing sexual harassment in Victorian workplaces.

This is why VTHC supports the recommendations put forward by the Australian Council of Trade Unions (ACTU) and Australian trade unions. The ACTU's recommended amendments would strengthen the Bill and allow it to fulfil its

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aims. They include amendments to cover conduct by third parties as part of the scope of an employers' positive duties, amendments that allow workers and trade unions to make complaints and bring claims regarding non-compliance with the positive duty, as well as amendments to ensure directors are liable for breaches of the positive duty.

Enforcement of Positive Duty

In Victoria, the EO Act creates a positive duty for employers to ensure that workers are safe from physical and psychosocial risks at work, including from sexual harassment. The model proposed by the draft Federal Bill replicates the positive duty in the Victorian EO Act. However, VTHC has had to deal with a number of serious issues with this system in practice. VTHC puts forward these criticisms in order to ensure that deficiencies in Victorian laws are not repeated in the federal context.

As in the Bill, the relevant human rights commission in Victoria, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is the only body tasked with the job of assessing compliance with the positive duty.

Even with the power to investigate, however, VEOHRC does not have the power to compel information or inspect documents. This makes the commission much weaker than equivalent statutory investigative bodies such as the Wage Inspectorate Victoria or WorkSafe Victoria. It has also only undertaken one investigation into a possible breach of the positive duty since the positive duty was introduced and came into effect in 2011. That investigation did not speak to a single worker about their experiences in that workplace. At best, workers can tip off VEOHRC about breaches of the positive duty, but investigations are extremely rare and enforcement is non-existent. As a result, there are no repercussions for employers who breach their positive duty under the EO Act. The federal Australian Human Rights Commission must have the power to compel information and inspect documents, as well as stronger enforcement powers, if it is to hold employers accountable for the safety of their workplaces.

This is also why Victorian unions continue to argue for the ability for an individual worker or trade union to bring about enforcement. For equal opportunity legislation to have teeth, enforcement abilities cannot lie with just the commission, it must be accessible to individuals and organisations as well. This way, if conciliation fails at the commission, then the worker has the option to begin a court proceeding to enforce penalties and fines. This allows workers and union representatives to be proactive about lack of compliance with the positive duty rather than being constrained to only responding reactively to when harm has already occurred.

To finally begin to lessen the scourge of sexual harassment in our workplaces this Bill must result in a regulator with teeth and a culture that pursues transgressors. It is vital we do not repeat mistakes made in the Victorian laws. The enforceability of the Sexual Discrimination Act in this Bill, beyond the AHRC, is vital if we are to finally improve the safety of women at work.

Consultation with Trade Unions in Investigations

Industrial officers and solicitors of Victorian unions believe the VEOHRC's investigation into Bakers Delight also showed major failings that must be avoided in any federal human rights investigation.

As far as VTHC is aware VEOHRC failed to consult with workers or relevant unions in relation to the terms or scope of the investigation. The consultation that occurred was extremely general, with unions only becoming aware that an investigation into that particular enterprise had occurred when the VEOHRC report was released. They further failed to consult with relevant unions around previous reports of sexual harassment or other unsafe work conditions at Bakers Delight prior to or during their investigation. This is despite relevant unions and community legal centres already assisting workers from Bakers Delight and keeping extensive records of historic complaints.

As outlined in the ACTU submission, VEOHRC also failed to consult with any individual workers throughout the course of their investigation, speaking only to management. There were no public calls for information. Given the VEOHRC's lack of power to compel evidence, it relies entirely on cooperation. Its findings are therefore significantly skewed by employers' willingness to cooperate and share information.

As recommended by the ACTU, VTHC strongly urges the Federal Government to amend the Bill to ensure that, in exercising its compliance functions (including the inquiry and enforceable undertakings functions), the AHRC is required to notify, consult with and provide the opportunity to make submissions to workers and their trade unions. This will ensure that investigations include worker experiences, not just the perspectives of the employer or duty holder.

Cost Model

VTHC also strongly supports the ACTU's proposed cost model. It is our view that using an 'equal access' model is a more equitable alternative to the costs neutrality model proposed. The essence of the equal access model is that costs orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.

Whilst the costs neutrality model is an improvement, it still gives courts too much discretion to order costs against a worker. Costs neutrality might sometimes allow a worker-applicant to recoup their legal costs, but the model risks workers being liable for the costs of the respondent/employer. The proposed considerations allow an extremely wide range of reasons to make costs orders against applicants, which only increases uncertainty. Corporations

acting as respondents will be able to pursue strategies to obtain costs orders that are many times more expensive than the legal costs of an individual worker, due to the use of large and expensive private legal teams.

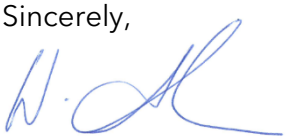
Ultimately, the fear of a potential costs order against a worker-applicant will deter workers (especially low-income, young and/or migrant workers who are more vulnerable to and more likely to experience sexual harassment) from speaking out and seeking justice. As such, VTHC strongly endorses the ACTU's equal access model to ensure that workers have genuine access to the enforcement of their rights to a safe workplace.

Any potential disincentive to speak out risks allowing perpetrators to continue their actions and employers to continue to turn a blind eye. This will result in workers continuing to be victims of sexual harassment.

Women workers across Australia deserve to be safe at work from sexual harassment and other forms of gendered violence. It is vital that the Federal Government learn lessons from Victoria and get the amendments right, to empower working people to hold employers to account on workplace safety.

If you have any questions, please contact Politics and Research Lead, Ted Sussex, at tsussex@vthc.org.au.

Sincerely,



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