31 August 2021

Ms Bronwyn Halfpenny MP
Ms Liberty Sanger
Co-Chairs
Ministerial Taskforce on Workplace Sexual Harassment
Via email: workplacesafetyreform@justice.vic.gov.au

Dear Ms Halfpenny and Ms Sanger,

RE: MINISTERIAL TASKFORCE ON WORKPLACE SEXUAL HARASSMENT

The Victorian Trades Hall Council (VTHC) welcomes the opportunity to make a written submission to the Ministerial Taskforce on Workplace Sexual Harassment.

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 in both the public and private sectors. Since winning the Eight Hour Day in 1856, VTHC has had a long history of fighting for and defending the rights of all workers in Victoria.

Women in unions have been at the forefront of the struggle for all women to be safe, respected and equal at work. From the staunch women in the tailoresses union who went on strike in the 1880's for fair pay, to Zelda D'Aprano and her trade union sisters who chained themselves to buildings in 1969 for equal pay and right up to today, union women have fought tirelessly for fairness and equality in the workplace.

Attached is a submission written by VTHC in conjunction with affiliated unions regarding sexual harassment in Victorian workplaces. This submission has been framed by the history of that struggle, and the struggle of Victorian workers who continue to face sexual harassment in the workplace. It makes several key recommendations on behalf of the union movement about how to ensure we eliminate sexual harassment and ensure the that workplaces are safe for all workers into the future.

If you have any questions or would like further information, please do not hesitate to contact Harriet Leadbetter, Political Organiser, on 0400 121 741 or via email at hleadbetter@vthc.org.au

Yours sincerely,

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Ending Sexual Harassment in the Workplace

VICTORIAN TRADES HALL COUNCIL | AUGUST 2021

ACKNOWLEDGEMENT OF COUNTRY

Victorian Trades Hall Council acknowledges the Wurundjeri Woi Wurrung of the mighty Kulin nation as the traditional owners of the land on which we live, meet and work. This land was stolen and never ceded, always was and always will be Aboriginal land.

ABOUT VICTORIAN TRADES HALL COUNCIL (VTHC)

VTHC is the peak body representing workers and unions across Victoria. We represent over 430,000 workers and 40 affiliated unions, covering all sectors of the economy, both public and private.

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Introduction

This submission has been developed around the lived experiences of working women.

Victorian Trades Hall Council (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, both in the public and private sectors.

Since gaining the Eight Hour Day in 1856, VTHC has had a long history of fighting for and defending the rights of workers in Victoria. VTHC will continue to campaign tirelessly for the rights, entitlements and protections of workers, no matter their employment status, employer or workplace.

Few if any workplace rights have been won without the involvement of the Victorian union movement.

This includes:

- The Eight Hour Day,
- The minimum wage,
- The 38-hour work week,
- Superannuation,
- Access to Medicare,
- Occupational health and safety (OHS) protections,
- Parental leave, and
- Family and domestic violence leave.

In 2015, the VTHC developed Women's Rights at Work (WRAW) Chats – structured conversations and surveys of working women's experiences. Since then, WRAW Chats have rolled out across all sectors and industries with women from across the state, talking about the challenges they face and sharing their ideas for change. The recommendations made in this submission are drawn from the experiences, input and feedback of women who have taken part in this process as well as from extensive consultation with affiliated unions.

Sexual harassment continues to be a problem in Australian workplaces, and Victoria is no exception. The Australian Human Rights Commission 2018

survey: 'Everyone's Business: Fourth survey on sexual harassment in Australian workplaces' (the 2018 National Survey) outlines the prevalence of sexual harassment in Australian workplaces. The survey found that 33% of people who had been in the workforce in the last five years had experienced workplace sexual harassment. Women were more likely than men to experience sexual harassment, but the majority of harassers were men.[1]

Particular population groups are at greater risk of sexual harassment in the workplace, including women, young workers, LGBTQI workers, Aboriginal and Torres Strait Islander workers, workers with disability, workers from CALD backgrounds, migrant workers or workers on temporary visas, and other vulnerable workers.

But surveys are unlikely to capture the true extent of the problem. The Australian Council of Trades Unions (ACTU) 'Sexual Harassment in Australian Workplaces: Survey results (Report 2018)' indicated that only 58.8% of people who experienced sexual harassment told someone about it.[2] Of those only 26.7% made a formal complaint.[3]

Sexual harassment can take many forms including but not limited to:

- verbal forms of sexual harassment, such as sexually suggestive comments or jokes, intrusive questions about private life or physical appearance, repeated invitations to go on dates, or requests or pressure for sex;
- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, indecent exposure or stalking;
- sexual harassment through technology, including sexually explicit emails, calls, SMS or social media;
- offensive imagery including sexually explicit posters; and
- sexual assault.

No worker should be unsafe at work, but sexual harassment has huge ramifications for our safety at work. For victim-survivors, an incident of sexual harassment can have negative impacts on their psychological health, while also impacting their employment and progression. Sexual harassment also often has significant financial consequences for those who experience it, as they often sacrifice income in order to reclaim personal autonomy and control. While WorkSafe data on workers' compensation claims relating to possible sexual harassment/assault shows that these claims are only a small portion of workplace sexual harassment cases, the impact of this hazard on work is clear. Across the 2015-2018 financial years, an average of 257 days was lost from work for sexual harassment/assault claims, compared to an average of 147 days for all other claims.[4]

The problem of sexual harassment in the workplace is a thorny one, but at its core is a workplace health and safety issue. Our occupational health and safety (OHS) system is structured in a way that means it is better able to cater for physical risks.[5] But we should be equally concerned with psychological injuries that are expressions of systemic inequalities in power and privilege. The Respect@Work Inquiry found that gender inequality was the key power disparity driving sexual harassment.[6] Cultures of sexism and gender inequality enable norms and behaviours that accept and trivialise the violence that women and gender-diverse people experience. The historical and continuing undervaluing of women's work, levels of workplace participation and control over the way work is organised all contribute to a system that enables sexual harassment to occur. Where women remain unequal, the threat of sexual harassment will remain.

Addressing sexual harassment requires dismantling the systems of work and culture that enable it. It is important to interrogate how we do work, who does what work and who has power and control over decision-making in the workplace. For too long, we have urged cultural reform led from the top down, elevated 'ambassadors of change' and recommended that businesses just simply 'do the right thing'. It is clear that this isn't enough - changes to our systems of work will not happen naturally, but instead require clear and deliberate intervention.

An end to sexual harassment and gendered violence in the workplace will only be achieved through collective action. Workers and their representatives are key to this. Real and meaningful change can only occur in partnership with government, unions and employers and with the engagement and input from workers at every level, from the floor all the way up to the CEO.

We note the extensive research already done in this space by the Respect@Work Inquiry, and as such our submission does not seek to replicate this research. This submission from Victorian unions seeks to build on this research by remaining action-focused. VTHC seeks to highlight the tangible steps that can be taken now by the Victorian government, employers and their representatives and workers and their representatives.

Prevention

To eradicate sexual harassment in the workplace, employers must take all steps to prevent it from occurring in the first place. Prevention is better than the cure. However, current approaches to preventing sexual harassment in workplaces have failed.

Under the Occupational Health and Safety Act 2004 (Vic) (OHS Act), employers are responsible for providing and maintaining so far as is reasonably practicable, a workplace that is safe and without risks to health, a duty that includes providing a work environment free from sexual harassment.

As the Respect@Work report noted, much of the existing prevention mechanisms have remained unchanged for decades, still focusing heavily on policies that prohibit sexual harassment and complaint mechanisms for workers to report harassment.[7] VTHC makes several recommendations to strengthen prevention of sexual harassment in the workplace.

ELEVATE, PROMOTE AND SUPPORT THE ROLE OF HEALTH AND SAFETY REPRESENTATIVES (HSR)

Elevating the role of HSRs gives power to workers to act collectively to address safety risks.

An occupational health and safety representative is a person elected by workers at their workplace to represent them on any and all occupational health and safety matters. The Victorian OHS Act designates rights and powers to elected HSRs as well as obligations to employers regarding HSRs.

Powers of an HSR include the ability to:

- Be consulted about health and safety matters that may affect the Designated Work Group (DWG) including identifying risks, making decisions about control measures and processes for remedying risks and hazards;
- Access information concerning actual and potential hazards that may affect the health and the safety of workers in the DWG;
- Issue a Provisional Improvement Notice (PIN) requiring the employer to take certain actions after consulting with the employer about a health and safety issues;
- Request a review of control measures where

a new risk or a change in risk levels has been identified; and

- Direct work to cease where that work involves an immediate threat to the health and safety of any person.

Both the OHS Act and WorkSafe recognise the importance of the role of HSRs in keeping a workplace safe, and WorkSafe believes HSRs should be encouraged, supported and protected. WorkSafe's 2024 goals include 'supporting Victoria's network of health and safety representatives'.

HSRs can make tangible improvements in health and safety outcomes by empowering workers to act collectively to address safety risks rather than shouldering the burden on their own. While employers have the duty to provide a safe workplace, HSRs play an important role in keeping workplaces safe by being 'eyes on the ground' – able to identify and work with employers to address risks. The importance of health and safety representatives cannot be underestimated.

The extensive powers given to an HSR coupled with their understanding of their specific workplace means they are uniquely positioned to address practices and ways of working that allow sexual harassment to occur. All HSRs should be equipped with information on and tools to prevent sexual harassment in the workplace.

Currently, HSRs can undertake a WorkSafe approved Refresher Training through VTHC that specifically addresses gendered violence including sexual harassment. The training provides HSRs with the confidence, skills and knowledge to represent their co-workers when raising health and safety concerns in relation to work-related gendered violence. This training should be extended to all HSRs, by amending section 67 of the OHS Act to give HSRs the right to paid time off to attend a refresher course at least twice a year without refusal from their employer.

This would allow HSRs to take the Gendered Violence refresher training in addition to another refresher course. Additionally, given the serious risk to safety posed by sexual harassment and gendered violence, the content of this Refresher Training should be incorporated into the WorkSafe approved 5-day HSR Initial OHS Training Course, so that all HSRs are equipped with knowledge from the beginning. WorkSafe should work in conjunction with VTHC to achieve this.

A consistent understanding of gendered violence and sexual harassment across our occupational health and safety system is crucial to ensuring effective prevention. WorkSafe Inspectors should have an equal understanding of the risks and impacts of sexual harassment in the workplace to ensure that when notified of sexual harassment they can work appropriately with the complainant, HSRs, and employers to rectify the brief. It is crucial that WorkSafe Inspectors undertake training that mirrors the training undertaken by HSRs, while also specifically equipping them with the knowledge and tools they need to appropriately address sexual harassment in workplaces. Given the expertise of VTHC in this space, WorkSafe should work collaboratively with VTHC on the development and roll out of this training for inspectors.

To complement the extensive training undertaken by HSRs and WorkSafe Inspectors, WorkSafe should develop training for managers and supervisors on the powers held by an HSR and on their own duties under the OHS Act. This would ensure that from the floor to the CEO, every level of the workplace has a consistent and shared understanding of health and safety in the workplace, including how it interacts with sexual harassment. This training should be developed in conjunction with relevant union and industry representatives.

Recommendation 1: *Make the VTHC 'HSR Refresher Training Course - Work-related gendered violence including sexual harassment' accessible for all HSRs by amending s67 of the OHS Act to give HSRs the right to attend at least two refresher trainings in a year.*

Recommendation 2: *Amend the current '5-day HSR Initial OHS Training Course' to include specific content addressing work related gendered violence.*

Recommendation 3: *Require all WorkSafe inspectors to undertake Gendered Violence training that equips inspectors with the knowledge and resources they need to deal with sexual harassment allegations. This training should be developed in conjunction with VTHC.*

Recommendation 4: *WorkSafe, in conjunction with unions and industry representatives, develops OHS training specifically focused on the powers given to HSRs under the OHS Act, in addition to their own obligations under the Act.*

DEDICATED WORKSAFE INSPECTORATE

As sexual harassment is a workplace safety risk, it must be dealt with within an OHS framework. Ensuring that employers take their legal responsibility to provide a safe workplace seriously will only happen if WorkSafe as a regulator is properly equipped and resourced to address workplace sexual harassment.

WorkSafe Victoria should be resourced to establish a dedicated inspectorate and prosecution unit that is equipped to deal with matters of gendered violence and workplace sexual harassment. WorkSafe has established specific, targeted units before in order to explicitly focus on the health and safety needs of specific industries. Given the widespread occurrence of sexual harassment in the workplace, and the nature of sexual harassment itself, it is a health and safety issue that needs the undivided attention of a specialist unit. WorkSafe Victoria should commit to piloting a specialist unit, with the view to ultimately socialising the knowledge and powers of this unit across WorkSafe more broadly.

The specialist unit should be dedicated to ensuring that employers understand the systems of work that need to be addressed, minimised or removed in order to prevent sexual harassment in the workplace. This work will complement the powers held by HSRs in workplaces.

As part of the establishment of this specialised unit, WorkSafe Victoria should undertake to increase the number of women and gender-diverse inspectors. As discussed during Taskforce meetings, at present the Inspectorate is predominantly male. Given the gendered nature of most sexual harassment in the workplace, this presents a significant barrier to victim-survivors feeling comfortable and safe to disclose and discuss incidents of sexual harassment. This must be rectified in order to limit the barriers to reporting, by ensuring that the specialist sexual harassment unit is led by women, and predominantly staffed by women.

Recruitment for the unit should be multidisciplinary and targeted at high-risk industries and high-risk cohorts. WorkSafe Victoria should seek to recruit inspectors from unions who have a proven record in identifying and dealing with sexual harassment in a workplace setting. Doing so would ensure that WorkSafe doesn't need to 'start from scratch' when training inspectors but will instead be working with inspectors with a strong understanding of industrial relations frameworks, OHS laws and gender-based violence. Inspectors should have a broad range of skills and include staff with social work experience. In addition, WorkSafe Victoria should target recruitment at high-risk cohorts, including multicultural communities, to ensure that inspectors reflect the workplaces for which they are responsible.

A specialised unit should also support specific and targeted oversight of industries that don't necessarily reflect traditional workplace structures and workers who might not have a recognised employer, for example labour hire, gig economy or freelance work. When instances of sexual harassment occur in these workplaces and occupations, it can be unclear who the responsibility lies with to ensure a safe workplace. Having a dedicated sexual harassment unit would provide an avenue for workers to turn to, to clarify responsibilities under the Act, establish accountability and enforce safe practices.

As discussed earlier in this submission, in addition to the establishment of a specialist unit, all WorkSafe inspectors should be required to undertake training in gendered violence and

sexual harassment. This will complement the training that HSRs undertake, and will ensure that across our OHS system, key actors will have shared understanding that gender inequality is a key driver of sexual harassment and gendered violence in the workplace. Without this targeted training, WorkSafe Inspectors will be unable to implement enforcement strategies that adequately address the workplace practices that support sexual harassment to occur in workplaces across Victoria.

Recommendation 5: *WorkSafe Victoria should establish a women-dominated, multi-disciplinary inspectorate and prosecution unit with responsibility for investigation and enforcement of sexual harassment and gendered violence.*

GENDERED VIOLENCE COMPLIANCE CODE

VTHC has been proud to work with the Victorian Government and WorkSafe Victoria to develop the 'Work-related gendered violence including sexual harassment' guidance note.[8] However it is the view of VTHC that this guidance note should be elevated to a Compliance Code.

Compliance Codes provide practical guidance to those who have duties or obligations under the OHS Act – outlining the ways in which an employer can meet their obligations under the Act and OHS Regulations. While a Compliance Code is not mandatory, formalising the gendered violence guidance into a Compliance Code sends a clear message of the seriousness of sexual harassment and gendered violence as workplace hazards.

Establishing a Gendered Violence Compliance Code will ensure two things.

Firstly, it will prevent employers being able to claim ignorance on how to deal with the problem of sexual harassment. A Compliance Code will help an employer to identify and discharge their obligations under the OHS legislation and Regulations. It will break down the steps needed to be undertaken, thereby ensuring that there is no excuse for negligence in this space. Failure by an employer to adhere to a Compliance Code could also be used as evidence in any prosecution arising from a breach of the OHS Act.

Secondly, a Compliance Code outlines a roadmap for inspectors and HSRs to use to help achieve compliance with OHS laws in a workplace. A Compliance Code could be cited by an inspector or HSR as a means of attaining compliance where they have identified that the employer has breached OHS legislation in a failure to provide a safe workplace.

WorkSafe Victoria already has several Compliance Codes in relation to significant and widespread workplace hazards, including but not limited to:

- Confined spaces
- Managing asbestos in workplaces; and
- Prevention of falls in housing construction

It is the view of VTHC that sexual harassment and gendered violence are risks that require greater and targeted regulation, and this can be achieved by elevating the WorkSafe Guide 'Work-related gendered violence including sexual harassment' into a Compliance Code.

Recommendation 6: *That WorkSafe Victoria elevates the WorkSafe Guide 'Work-related gendered violence including sexual harassment' into a Compliance Code.*

PROCUREMENT AND LICENSING

The Victorian government has the opportunity to harness the spending power of the state to ensure that Victorian workplaces are free from sexual harassment.

A strong government procurement policy is an important step in solving the significant problem of sexual harassment in the workplace. The partnership of government and unions has resulted in the important intervention in the labour hire industry with the establishment of the Victorian Labour Hire Licensing Authority, and more recently with the historic passage of the nation's first wage theft laws and the implementation of workplace manslaughter laws.

The Victorian government should continue this work by committing to a procurement framework that signals that sexual harassment has no place in Victorian workplaces.

The state government should at all times be a model employer, therefore government contractors and all recipients of public money should be expected to be model employers as well.

Recognising that gender inequality is a key driver of sexual harassment in the workplace, all organisations tendering or working for the Victorian government should be required to have a Gender Equality Action plan in place. In addition, businesses and organisations should be required to undertake Gender Equality audits and to ensure that directors and staff members have completed a WorkSafe accredited sexual harassment training within the last twelve months. Workplaces that take steps to identify the barriers to gender equality within the workplace are better placed to implement work practices, policies and guidelines that work to eliminate the cultures which enable sexual harassment and gender-based violence.

It is the view of VTHC that these procurement guidelines should cover all state-funded work, including the provision of services. VTHC supports penalties up to and including termination and exclusion from future government contracts. A standard industrial disciplinary arrangement should be considered where recipients of public money would be subject to first, second and third and final warnings with the capacity for immediate termination of contracts for serious or repeated breaches of the OHS Act and the Equal Opportunity Act 2010 (Vic) (EO Act).

The Victorian Government also has a duty to utilise its role as a licensor to reflect community expectation and values around sexual harassment in the workplace. The Victorian Government oversees numerous licencing systems, not just associated with industrial relations, that can be leveraged to ensure licence-holders reflect community expectations.

The Victorian Government issues several different licences to businesses in Victoria, including liquor licenses, labour-hire licenses and conveyancers' licenses. VTHC recommends that the Victorian Government ensure that, in order to obtain state government licenses, license-holders need to attend training on gendered violence, develop gendered violence policies, and have clear processes in place to deal with gendered violence

There should also be clear and significant penalties for breaching these duties around sexual harassment. License-holders found to have breached duties around sexual harassment should lose their license or be subject to a workplace inspection by a relevant regulator.

Recommendation 7: *The Victorian government should review procurement guidelines to require any business who wants to receive taxpayer funds in any form to meet minimum requirements around gender equality and sexual harassment.*

Recommendation 8: *The Victorian government reviews procurement guidelines to ensure that any contracting party that does not comply with gender equality and sexual harassment requirements faces penalties up to and including termination of contract.*

Recommendation 9: *State licenses require license-holders to attend gendered violence training and show evidence of a workplace gendered violence policy and process.*

Recommendation 10: *Ensure that license-holders who breach gendered violence policy and process requirements are subjected to accountability processes.*

AMEND GENDER EQUALITY ACT TO REQUIRE DESIGNATED ENTITIES TO HAVE A SEXUAL HARASSMENT PLAN.

The Victorian Government should amend relevant regulations to ensure that designated entities are required to include mandatory clauses in their enterprise agreements that align with the requirements in the Gender Equality Act, and to implement a sexual harassment plan. This includes ensuring that all designated entities are required to codify the same high standard around disciplinary procedures, family violence leave, and parental leave entitlements, as government departments covered by the Gender Equality Act. Enterprises and organisations would be supported to do implement these measures by gender equality resources developed for small and medium enterprises by the Equal Opportunity Commission.

Recommendation 11: *The Victorian Government should amend relevant regulations to ensure that designated entities are required to include mandatory clauses in their enterprise agreements that align with the requirements in the Gender Equality Act, and to implement a sexual harassment plan.*

NON-DISCLOSURE AGREEMENTS

Non-disclosure agreements (NDAs) are used frequently in the settlement of sexual harassment cases, particularly ones centred in the workplace. NDAs are designed to ensure confidentiality about the matter in question, as well as the terms of settlement. NDAs also often include non-disparagement clauses, where parties provide commitments not to discredit each other in relation to the issue in question.

NDAs enable harassers to continue with impunity and enable employers to hide health and safety risks from their employees. While proponents of NDAs point to opportunities for greater compensation of a victim, it is clear that NDAs are often used to safeguard the reputation of a business by silencing a victim. This not only has repercussions for the victim, who often cite feeling isolated and disempowered by the conditions of an NDA, but also perpetuates a culture of silence which releases employers from any obligation to address the systems of work that allowed the sexual harassment or assault to occur.

Further, NDAs have consequences for all workers in a workplace, they allow employers to know about a risk to their health and safety that their employees are not privy to.

The use of NDAs also prevents the collection of meaningful data on the rate of sexual assault and harassment in the workplace. During the Respect@Work Inquiry, the Sex Discrimination Commissioner wrote to large employers asking them to allow people to make confidential submissions to the inquiry but issuing limited waivers of confidentiality obligations. Only 39 organisations agreed.[9]

As the Respect@Work Report found, NDAs can also enable repeat offenders to continue in the industry with impunity, through the inclusion of non-disparagement clauses. In other words, both future employers and workers are unaware of the risks that the harasser poses. In workplaces where the harasser stays on, other workers aren't privy to the risk the harasser continues to pose.

The Respect@Work Report made the following recommendation in relation to non-disclosure agreements:

> *The Commission, in conjunction with the Workplace Sexual Harassment Council, develop a practice note or guideline that identifies best practice principles for the use of NDAs in workplace sexual harassment matters to inform the development of regulation on NDAs.*[10]

It is the view of VTHC that this does not go far enough. While employers, legal practitioners and advocacy groups are beginning to recognise the negative implications of non-disclosure agreements, the prevalence of NDAs and confidentiality clauses is unlikely to be addressed without legislative amendment. Other jurisdictions have recognised the barriers that NDAs create to eliminating sexual harassment from the workplace and are taking steps to prevent their use in cases of workplace sexual harassment and assault. Legislation to this effect has been enacted in New Mexico, while a Bill before the Irish Parliaments seeks to limit the use of non-disclosure agreements in a sexual harassment matter to a very specific set of circumstances where it is the express wish of the employee to enter into such an agreement. VTHC has attached the Irish Bill as an appendix to this submission for consideration.

VTHC recommends that the Victorian Government consider legislative amendments which provide that all non-disclosure agreements in Victoria can only be enforced in the following circumstances. VTHC supports amendments that reflect that:

1. An employer may only enter into a non-disclosure agreement (also described as a confidentiality or non-disparagement agreement) if it is the express wish of the employee.
2. If such an agreement is reached, it will only be enforceable when:
    a. The employee has the opportunity to obtain their own legal advice;
    b. There have been no undue attempts to influence the employee;
    c. The agreement does not adversely affect:
        i. The future health and safety of a third party;
        ii. The public interest
    d. The Agreement provides the employee with an opportunity for relevant employee to waive confidentiality in the future and is for a set and limited duration.
3. Any non-disclosure agreement will not prevent an employee from reporting the conduct:
    a. As part of a protected disclosure
    b. As part of a communication regarding the harassment or discrimination between:
        i. The police;
        ii. A legal professional;
        iii. A medical or mental health professional;
        iv. A relevant trade union
        v. A relevant state regulator;
        vi. A prospective employer; or
        vii. A friend, family or personal supporter.

The Victorian government should consider whether such amendments should be made to the EO Act or stand-alone legislation to ensure that the scheme regulates all non-disclosure agreements made in Victoria (whether such claims are commenced under the EO Act or federal legislation).

Recommendation 12: *The Victorian government legislates to ban all non-disclosure agreements in cases of workplace sexual harassment and discrimination, other than those requested by victim-survivors to protect their own confidentiality.*

SUMMARY

Prevention of sexual harassment can only be achieved through collective action. This work must be led by workers and their representatives through the training, upskilling and empowerment of workplace HSRs. Knowledge is power, and the Victorian government can take significant steps to ensure that employees are not denied critical information about sexual harassment risks in their workplaces by restricting the use of NDAs to very specific cases, and only ever at the request of the worker alleging the sexual harassment.

WorkSafe should set workplace expectations by establishing and resourcing a dedicated sexual harassment unit. In addition to this, it should elevate the Gendered Violence Guidance Note into a Compliance Code, to equip employers and workers with the tools they need to prevent sexual harassment and gender-based violence in the workplace. A Compliance Code would also play a role in the enforcement of positive duties.

Gender inequality drives sexual harassment by minimising the role and lived experiences of women in the workplace. The Victorian government must take significant steps to reducing gender inequality, by leveraging its procurement power to require recipients of public money to implement Gender Equality Action Plans and undertake Gender Inequality training.

Support

Reporting sexual harassment in the workplace can often be a harrowing experience, and workers need more support to both make reports, as well as seek justice. VTHC makes the following recommendations to increase support given to victim-survivors through a complaint process.

A VICTIM-CENTRED APPROACH

Victim-survivors of sexual harassment at work often state that reporting is a traumatic experience. The Respect@Work report outlined that victim-survivors have likened their experiences of reporting to being 'under siege', while others detailed how they were subjected to processes that were "disempowering, lacked compassion and impartiality"[11].

For many women, the problems are intensified by a power imbalance in the system. While larger organisations have resources and HR departments that can support employers through allegations of workplace sexual harassment, many women who are not members of their union or supported by a targeted community legal centre (CLC) must shoulder the burden of running their matters alone.

It is clear that more support is needed for victim-survivors of workplace sexual harassment and gendered violence.

The Respect@Work report made several key recommendations in relation to institutional support needed for women:

> *Recommendation 49: Australian governments should establish/fund Working Women's Centres to provide support and advice to women around workplace issues;*
>
> *Recommendation 53: Australian governments should provide increased funding to CLC's to provide advice and assistance to vulnerable workers who experience sexual harassment, especially workers facing intersectional discrimination;*

While a Working Women's Centre already exists in South Australia, Queensland and the Northern Territory, it should be introduced in Australia's most progressive state, Victoria, with urgency.

The need for such a centre is clear. A Working Women's Centre could limit the trauma of navigating multiple legal systems and claims and help to shoulder the burden of re-telling the incident by providing a dedicated support and advocacy service. They are a "a valuable source of holistic assistance for victims".[12]

It is critical that any working women's centre must be delivered through the trade union movement. In order to be successful a Working Women's Centre must be delivered on the ground through established workplace structures. Access to workplaces can only be offered and guaranteed through unions. Victorian unions have been on the forefront of advocacy for women members, however specialised funding needs to be provided to deliver a dramatic scaling up and targeting of specific programs and services.

VTHC, as the peak body for unions in Victoria, has significant experience with service delivery models, currently operating the Young Workers Centre, which is designed to support young workers through:

- Frontline advocacy and critical advice support through an established community legal centre (CLC) service
- Ground-breaking research and data collection
- Educational outreach into schools and universities
- Targeted training programs

A Working Women's Centre would be based off this model and could deliver on the recommendations outlined by the Respect@ Work Report by:

- Providing industrial and legal representation for women on issues ranging from sexual harassment to wage theft and parental leave;
- Providing confidential information and support, direct referrals to other women's support services
- Delivering flagship 'Respectful Workplaces' training, alongside other OHS and gendered violence training programs, including for HSRs;
- Providing education and training to empower community and women's organisations on workplace gendered violence; and
- In partnership with affiliated unions, identifying and understanding industry specific threats of workplace sexual harassment and implementing targeted plans to address them.

Recommendation 13: *The Victorian government funds the establishment and operation of a Working Women's Centre at VTHC to provide advocacy and support to victim-survivors in collaboration with the union movement.*

RESTORATIVE JUSTICE

Research demonstrates that sexual harassment can be a significant impediment to career success.

The 2018 National Survey showed that one quarter (25%) of people who said they were sexually harassed in the workplace in the last five years experienced negative impacts to their employment, career or work as a result of the most recent incident.[13] Workers who have experienced sexual assault often have to undertake significant measures to avoid their harasser in the workplace, which meant they missed out on work or networking opportunities. Many cite taking personal leave, avoiding training and learning opportunities and adjusting their behaviour at work in an attempt to maintain a level of personal safety in the workplace. Ultimately, many women leave the workplace as a result of harassment. Research conducted by Victorian Trades Hall Council[14] shows that 19% of women reported an "unsafe work environment" as one of the factors in them leaving the workplace.

Women are not only suffering as a result of the initial harassment but are also paying the price for the employer's inability to appropriately deal with a complaint. The perceived adversarial nature of alleging sexual harassment colours a woman's experience of the workplace, and an alternative is needed to ensure that sexual harassment allegations can be dealt with promptly and effectively, while also creating the conditions necessary for a complainant to return safely to the workplace.

VTHC recommends that WorkSafe should be funded to pilot a restorative justice model for matters of sexual harassment. The Victorian government has already implemented such a scheme to deal with matters of family violence, and a scheme within the workplace safety context could be modelled on this. The Victorian Royal Commission into Family Violence recommended the establishment of this framework in response to a recognition that traditional justice approaches did not fully meet the needs of some victim-survivors and that an additional course of justice was required.

A restorative justice process can repair the harm caused to a victim survivor, as well as providing an avenue to openly address unresolved concerns they may have. Restorative justice in this instance could play an important role in helping workers re-establish trust in their workplace and a feeling of safety in the workplace. While the government's Framework for Restorative Justice for Victim Survivors of Family Violence argues that the role of a restorative justice process is not one of mediation or for the establishment of negotiating an agreement for a plan of action, other jurisdictions encourage an offender and a victim to agree a plan of action in order to help right the harms done.[15]

Imbedding a sexual harassment justice process in the WorkSafe system could allow for a model that permits acknowledgement of harm but also charts a path forward that allows a victim-survivor to feel comfortable to remain in the workplace.[16]

A workplace sexual harassment restorative justice process would also play a role in improving employer responses to sexual harassment by facilitating a process in which the employer can listen and learn from the experience of a victim survivor, understand the conditions of work that enabled the harassment to take place and understand the necessary changes to be made in order for the employer to discharge their obligations under the OHS Act.

A successful restorative justice process would provide an opportunity for the perpetrator to acknowledge the impact of their behaviour and must also include space for an employer to identify, acknowledge and commit to steps to rectify the conditions that allowed the sexual harassment to occur. The process must be initiated by a worker, and it is integral that they are represented by either their union or a lawyer. Any restorative justice process must also not preclude the worker from their rights to a workers' compensation claim.

Recommendation 14: *WorkSafe to be funded to conduct a restorative justice pilot, aimed at achieving reconciliation as well as rectification of the system failure that has led to the sexual harassment incident/s.*

REPORTING OUTCOMES OF COMPLAINTS

Victim-survivors need to be empowered to make complaints of sexual harassment without fear. At present many workers are fearful of the very real consequences of reporting, a fear which is borne out of the inherent power imbalances in a workplace. Affiliated unions have highlighted

that members who raise complaints are often discriminated against by an employer when raising a sexual harassment complaint, whether explicitly or through more covert means. Consequences can include reputational damage, withdrawal of work, demotion and mistreatment.

Section 76 of the OHS Act prohibits an employer from dismissing an employee, discriminating against an employee or treating an employee less favourably because that employee is an employee who has raised an OHS issue, or has been an elected HSR or a committee member. While WorkSafe has stated that it treats any cases of alleged discrimination seriously and 'under its compliance and enforcement policy and general prosecution guidelines, prioritises allegations of discrimination for comprehensive investigation'[17], this has not been the experience of affiliated unions. Charges are laid infrequently for cases of sexual harassment under this provision, sending the message to employers that there are no consequences for punishing an employee for raising a complaint.

In order to remedy this and ensure that workers can come forward without fear of unfair repercussions, WorkSafe Victoria must run a targeted drive to enforce the prohibition on discrimination under the Act. Consequences for employers who breach this provision must also be increased to reflect the chilling effect that this behaviour has on reporting of sexual harassment in the workplace. If a worker fears they will be punished, they are far less likely to come forward. This remains a significant barrier to eliminating sexual harassment in the workplace.

Recommendation 15: *That the Victorian Government amends the OHS to increase the penalties for the victimisation of a complainant.*

Recommendation 16: *WorkSafe Victoria charges its inspectorate and prosecution units with a focused drive to enforce the prohibition on discrimination as established under section 76 of the OHS Act.*

To ensure a 'victim-centred approach', there must be action taken to ensure that a worker is not disadvantaged in work or career progression as a result of making a complaint. This also requires employers to deal with perpetrators of sexual harassment adequately and appropriately in the workplace. This responsibility must be balanced with maintaining a sense of autonomy, ownership and control for reporting workers, which requires a level of sensitivity and a considered understanding of the workplace reporting processes. Workplaces and employers need greater guidance from WorkSafe on how to manage perpetrators of sexual harassment in the workplace.

Recommendation 17: *WorkSafe, in conjunction with unions and relevant organisations, develops guidance materials for employers on how to deal with perpetrators of sexual harassment in the workplace effectively so that a complainant is not disadvantaged for making the complaint.*

IMPROVING THE MODEL FOR RESOLVING COMPLAINTS: EMPOWERING WORKERS AND UNIONS TO INITIATE CIVIL REMEDY CLAIMS FOR CONTRAVENTIONS OF OHS LAW

In the 2019/20 financial year, WorkSafe Victoria conducted a total of 47,831 workplace visits which resulted in 12,800 improvement notices being issued. WorkSafe is required to investigate but is not under any obligation to bring a prosecution. Despite a sizable number of inspections in the 2019/20, WorkSafe completed a mere 118 prosecutions.

The number of prosecutions for breaches of the OHS Act in a year is low for many reasons. Firstly, it is because the Act limits the right to prosecute contraventions to the State. Secondly, the evidentiary burden required is high – WorkSafe must prove beyond reasonable doubt that the employer failed to comply with the Act, rather than meeting the civil standard of proof which requires that the offence be proved on the balance of probabilities.

This has significant implications for cases of sexual harassment. Given the highly contested nature of sexual harassment allegations, WorkSafe might be discouraged from undertaking prosecution of an employer due to the high level of proof required. In a contested and highly charged space, where an injury is not necessarily physically visible, this can be a difficult threshold to meet. Given the low number of prosecutions undertaken by WorkSafe each year, it would be easy to prioritise cases where the evidentiary burden is more clearly met.

To ensure that employers are held to account when WorkSafe is not able to enforce the OHS Act, employees and their unions need to be

empowered to bring civil remedy applications to court to remedy contraventions of the OHS Act. This will allow workers and unions to further enforce safety in workplaces that WorkSafe does not reach. It is important that this is done within the framework of the OHS Act. Sexual harassment laws do not require an employer to take remedial action if they are found to be in breach of their obligations, but a contravention of the OHS Act would focus on the failure of an employer through their actions or omissions to provide a safe workplace and seek to both punish and remedy those failures.

VTHC supports the recommendation of Maurice Blackburn that workers and unions should not be out of pocket for initiating a claim arising from workplace sexual harassment. VTHC supports the establishment of a Costs Fund wherein:

- A successful party may make application to the Court for a Certificate for Costs;
- A grant of a Certificate for Costs by the Court would provide the right for the successful party to apply to the Costs Fund for reimbursement for any outstanding legal costs incurred in the course of the civil proceedings;
- The final decision as to whether the Costs Fund will make payment will lie with the Costs Fund itself after considering whether the application for costs is authorised under the provisions of the applicable legislation.

VTHC supports the recommendation that legislation be enacted to establish the powers of the Costs Fund and that ongoing funding be provided towards the establishment and operation of the Fund.

Recommendation 18: *The Victorian Government should implement legislative adjustments to enable workers and unions to initiate civil remedy proceedings for breaches of the OHS Act, including the creation of a Costs Fund for such claims.*

IMPROVING THE MODEL FOR RESOLVING COMPLAINTS: EMPOWERING UNIONS TO COMMENCE CLAIMS ON BEHALF OF MEMBERS UNDER THE EQUAL OPPORTUNITY ACT

Under the Equal Opportunity Act (EO Act), there is a positive duty on employers to prevent sexual harassment in the workplace. The legislation calls for "reasonable and proportionate measures to eliminate…discrimination, sexual harassment or victimisation as far as possible."[18] As outlined by Victorian Equal Opportunity and Human Rights Commission (VEOHRC), this duty can be discharged by complying with six standards; knowledge, prevention plan, organizational capability, risk management, reporting and response, monitoring and evaluation. However, this positive duty can only be enforced if VEOHRC refers a matter to the Victorian Civil and Administrative Tribunal (VCAT) following an investigation.

This proves problematic in practice. VEOHRC plays an important role as an educator of employers and seeks to work in conjunction with them to help them meet their obligations. Ultimately though, VEOHRC is not a workplace regulator, and the balance of VEOHRC as both prosecutor and educator is a hard one to strike. There is a risk that the desire to educate employers comes at the expense of the enforcement of this positive duty.

In order to remedy this gap, VTHC supports the recommendation by Maurice Blackburn that unions should be empowered to commence claims on behalf of members, with this support of a Costs Fund and further amendments to the EO Act. Unions are best placed to support workers through a claim of sexual harassment, having an intricate understanding of both the workplace conditions that encourage and enable sexual assault, but also the needs of a victim when seeking to remedy the incident. Representative proceedings would allow workers to collectively bring claims, through their union, empowering and strengthening their case in a workplace where significant breaches have occurred.

Amendments should be made to both the EO Act and the Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act) to allow for representative proceedings to be brought by unions on behalf of members. This amendment should also ensure that the positive duty under section 15 of the EO Act can be enforced through such representative proceedings. Such claims should be supported by the introduction of a Costs Fund similar to that discussed above.

Recommendation 19: *The Victorian Government amends the EO Act and VCAT Act to allow for unions to commence representative claims on behalf of members, including in relation to the enforcement of the positive duty.*

Recommendation 20: *That a Costs Fund be established as per the principles discussed above to support such claims.*

IMPROVING THE MODEL FOR RESOLVING COMPLAINTS: EMPOWERING WORKERS AND UNIONS TO COMMENCE CLAIMS IN THE FAIR WORK COMMISSION

The Fair Work Act and accompanying regulations establish the national framework governing the relationship between employers and employees in Australia. However, as the Respect@Work report noted, the Fair Work Act does not expressly prohibit sexual harassment.[19]

VTHC supports the submissions from unions and other non-government organisations to the Respect @Work Inquiry calling for sexual harassment to be explicitly included in the Fair Work Act to strengthen handling of these matters.

The Commission also recommended a range of complementary amendments to ensure the Fair Work Act comprehensively addresses sexual harassment:

- introduction of a 'stop sexual harassment order' equivalent to the 'stop bullying order'
- clarifying that sexual harassment can be conduct amounting to a valid reason for dismissal
- updating the definition of 'serious misconduct' to include sexual harassment.[20]

VTHC recommends that the Victorian government advocate to the Federal Government to implement the recommendations of the Respect@Work Report, and allow sexual harassment matters to be brought to the Fair Work Commission, including after employment has ended. It is critical that there is no requirement on the worker to remain in the workplace, particularly if it poses a threat to health and safety. Many women chose to leave workplaces that they experience sexual harassment in, so limiting proceedings to those who remain in employment at the relevant workplace would unnecessarily and cruelly restrict those who can bring matters before the Commission.

Further, public sector employees are currently unable to access the bullying jurisdiction under Part 6-4B of the Fair Work Act 2009 (Cth). To ensure public sector employees are also protected in their workplace, the Victorian Government must also extend the industrial relations powers referred to the Commonwealth to include stop bullying orders and stop sexual harassment orders.

Recommendation 21: *The Victorian Government should advocate for the Federal government to implement all 55 recommendations of the Respect@Work report.*

Recommendation 22: *The Victorian Government should advocate for the ability of a worker to bring a claim of sexual harassment to the Fair Work Commission for remedy.*

Recommendation 23: *The Victorian Government extend industrial relations powers referred to the Commonwealth to bullying and sexual harassment matters, allowing public sector employees to apply for orders or seek other remedies at the Fair Work Commission.*

REPORTING BACK TO THE COMPLAINANT

Workplace sexual harassment causes workers harm, and this harm is overwhelmingly reinforced by a significant lack of transparency regarding sexual harassment in many workplaces. Information about physical threats is much more openly shared, highlighted by WorkSafe Victoria's workplace death tally and lost time injury statistics. Transparency in cases of misconduct is important and sends clear messages as to what will and will not be tolerated within a workplace. Communicating more openly about sexual harassment normalises discussion around it, and demonstrates that it is taken seriously.

Alternatively, harm is further reinforced when an employer fails to deal with complaints of sexual harassment in an adequate and timely manner. As previously discussed, there are significant barriers to a worker reporting an incident of sexual harassment to an employer. Importantly, affiliated unions tell us that a worker needs to feel as if they are going to be believed, because they are far less likely to report where they have seen evidence of complaints not being taken seriously, employers responding in a dismissive manner, consequences for other victim-survivors who report and if there is a failure to report to the victim-survivor the outcome of any investigation.

When action taken by the employer is not reported back to the victim or other workers in the workplace, no one knows what the outcome is, and this reinforces the perception for many women that nothing comes of reporting. This is a dangerous sentiment to foster, as it results in under-reporting of sexual harassment as women believe it's just easier to suffer in silence. Failure to report outcomes creates a situation in which workers will no longer trust their employer to provide a safe workplace. This damage can be irreparable. Crucially for victims, justice must not only be done, but it must also be seen to be done.

It is crucial that a worker knows the outcome of a complaint. Employers should be required under the OHS Act to report back to the worker who has made the complaint, and the relevant HSR in the workplace on the steps taken to address the complaint, while also addressing the steps taken to reduce or eliminate the risk posed to workers.

Recommendation 24: *The Victorian government should require employers to report the outcome of investigations to victim-survivors of sexual harassment.*

SUMMARY

More can, and must, be done to support workers who have been victims of sexual harassment and gender-based violence in the workplace. To achieve a truly victim-centred response to workplace sexual harassment, workers must be supported by unions and union-led organisations that prioritise their wellbeing and justice. The Victorian government must immediately act to establish a Working Women's Centre in Victoria to provide support, industrial and legal representation and education to women who experience sexual harassment in the workplace. Barriers to justice must also be removed. The Victorian government must move to make complaints processes more accessible, affordable and, if desired, restorative in nature. Victim-survivors of sexual harassment must be supported to seek justice in whatever matter they determine appropriate for their circumstances.

Enforcement

It is critical that breaches of duties under OHS legislation are enforced. There is scope for WorkSafe as the OHS regulator to further exercise its enforcement powers to ensure that duty holders who fail to provide a working environment free from sexual harassment are compelled to remedy the breach. There must be further and additional penalties for non-compliance that reach duty holders directly, to ensure that problem of sexual harassment in workplaces is sufficiently considered and addressed.

In addition to several recommendations made earlier in this submission which would aid enforcement, VTHC would also recommend the following measures to increase enforcement of duties under the OHS frameworks.

PERSONAL LIABILITY FOR DIRECTORS AND EMPLOYERS

Under law, employers have a clear duty to provide a workplace free from sexual harassment and gendered violence. This reflects the reality that the employer has a far greater level of control over the way a workplace operates, and it is this responsibility which must be addressed in an effective prevention-based approach.

The Equal Opportunity Act makes sexual harassment against the law in certain areas of life, including in the workplace. Under the Equal Opportunity Act, employers have a positive duty to provide a safe workplace and to take all reasonable steps to prevent sexual harassment at work. Workplace leaders perpetuate unsafe environments when they do not take positive action to address sexual harassment. A number of workers told the Respect@Work Inquiry about instances where workplace leaders set a poor standard by their own disrespectful language and behaviour, or 'turned a blind eye', thus contributing to a culture that condones sexual harassment.[21]

In many workplaces, sexual harassment is primarily dealt with through 'formal channels' including lawyers and human resources. This largely shields managers, directors and leaders of workplaces from the true extent of sexual harassment in a workplace, as approaches from business deal

with complaints in a quiet matter designed to minimise damage and risk to the business. Employers have tended to focus on what they can do to avoid legal liability for sexual harassment in the workplace, rather than discharging their duty in a way that seeks to minimise and eliminate sexual harassment and gendered violence in their workplace.[22] Employers and directors remain at arm's length from these incidences, and it is clear that many employers do no take seriously their obligation to provide a workplace safe from sexual harassment.

A stronger deterrent for directors and employers is required in order for them to discharge their duties properly. VTHC recommends that the Victorian Government amend the OHS Act to make employers, self-employers and officers of an employer personally liable for a breach of the OHS Act, where that breach gives rise to workplace sexual harassment. This would not create additional duties for office holders under the OHS Act but would adequately punish corporate negligence and hold to account those who have the power to change systems of work. It makes more severe the consequences of failing to provide a safe work environment.

The Victorian Government has already reformed the OHS Act to increase the penalties for corporate negligence with workplace manslaughter laws passed in 2020, and VTHC recommends the government follow a similar model for sexual harassment. It is critical that this reform happens in the occupational health and safety framework. WorkSafe Victoria as the regulator and investigator, understands the OHS context and is experienced in proving negligence in OHS context in a court of law.

The aim of the legislation would be:

- to prevent workplace sexual harassment and gendered violence
- to deter persons who owe certain duties from breaching those duties and
- to reflect the severity of conduct that places workers at risk of sexual harassment in the workplace.

These laws will force corporations and companies in all workplace settings to take sexual harassment as a health and safety issue seriously. Health and safety culture changes when those at the top take it seriously. With recent high-profile cases demonstrating that even in our highest levels of government workplace leaders are deliberately ignoring instances of sexual harassment, corporate sexual harassment laws send a very clear message that negligence on this issue will no longer be tolerated. It is time for Victoria to take a stand against employers who put profit ahead of safety, who deliberately ignore sexual harassment in the workplace, whose own behaviour sets the standard for what is tolerated in the workplace and who fail to protect their employees from preventable risks and hazards.

In addition, VTHC recommends that the Victorian Government amends the EO Act to hold directors personally liable in circumstances where the Directors had knowledge of the sexual harassment.

Recommendation 25: *That the Victorian government legislates to hold company directors and senior management liable for incidents of sexual harassment in circumstances where it is found that they have failed to meet their obligations under the EO Act to take proactive measures to address sexual harassment and under the OHS Act to create a safe workplace.*

MAKE SEXUAL HARASSMENT A NOTIFIABLE INCIDENT IN THE OH&S ACT

OHS law requires employers to notify WorkSafe if a serious incident occurs in the workplace. Under Part 5 – Duties relating to incidents, an employer must notify WorkSafe immediately after becoming aware of any incident that results in death or an injury that requires substantial medical treatment. Notification is also required in instances where the employer or a person in charge of prescribed equipment becomes aware of a serious incident that exposes a person to an immediate risk to health or safety. These instances can include but are not limited to an implosion, explosion or fire, the escape, spillage or leakage of a substance or the collapse or partial collapse of a building or structure.

Notifiable incidents under these provisions are largely limited to physical threats. The damage that sexual harassment causes is not visible to the naked eye, but that does not mean the threat to health and safety is less significant. Notification of incidents in the workplace is important because it allows for the accurate identification of the cause of the incident, helps to identify trends within workplaces and industries, and assists workers,

HSRs, employers and WorkSafe in preventing similar incidents at other workplaces. It further ensures that there is transparent and accountable measurement of these incidents, which provides a source of evidence for ongoing analysis of success (or otherwise) in prevention strategies.

VTHC recommends a two-stage process to reporting of incidents of sexual harassment.

Firstly, VTHC supports the WorkSafe proposal that regulations under section 158 of the OHS Act are immediately amended to require employers to report de-identified data on sexual harassment incidents to WorkSafe. The information that an employer should be required to provide should include the number of incidents reported to the employer, details of when they occurred, outcomes of incident investigations (including identified causes, if any) and steps taken by the employer to remedy the incident/s. Reporting should occur quarterly. Any reporting requirements for employers should not preclude workers and unions being able to make reports to WorkSafe during this period. VTHC also recommends that WorkSafe investigates a mechanism for making this data accessible by the public.

This option would allow for reporting obligations to be introduced quickly, facilitating an increase in the data available to WorkSafe to inform the development of industry-specific education, targeted inspections, and prevention strategies. It is critical that WorkSafe is resourced to act on these reports. Workers must see that WorkSafe is investigating workplaces and requiring employers to modify systems of work. This will help to break down assumptions that "nothing happens when you report" and help to foster a culture of reporting that is so critical to tackling sexual harassment.

Secondly, VTHC recommends that the Victorian government amends section 37 of the OHS Act to include "an incident of sexual harassment" in order to make workplace sexual harassment a notifiable incident under the Act, within a two-year timeframe of concluding this review. Under this provision, employers and self-employed persons would be required to report to WorkSafe an incident of workplace sexual harassment immediately upon the incident being reported to the employer. A requirement to report should not be predicated on the 'seriousness' of the incident, as the employer is not best placed to make a judgement about this. Rather, that responsibility should rest with WorkSafe upon notification. It is acknowledged that this will potentially lead to an influx of reports for WorkSafe to deal with, and VTHC believes that this is the intended outcome. Employers are expected to notify of serious incidents in the workplace relating to physical hazards, so too will this obligation raise the profile of the seriousness of sexual harassment, and the subsequent psychological injuries.

In order to balance this obligation with a victim-survivor centred approach, complainants should be given the option to consent to be identified in the report to WorkSafe. Further, clear guidance (developed in consultation with unions) should be developed by WorkSafe to ensure there is absolutely clarity around this obligation.

Making workplace sexual harassment a notifiable incident would provide workers and HSRs with an additional mechanism to ensure that instances of workplace sexual harassment are dealt with appropriately by a workplace, and that steps are taken to eliminate the safety threat.

Recommendation 26: *Regulations under section 158 of the OHS should be amended immediately to require employers to report de-identified data on sexual harassment incidents to WorkSafe on a quarterly basis.*

Recommendation 27: *That WorkSafe investigates a mechanism for making de-identified data on sexual harassment incidents reported under section 158 of the OHS accessible by the public.*

Recommendation 28*: The Victorian Government should amend section 37 of the OHS to require workplace sexual harassment to be a notifiable incident under the Act, and develop subsequent clear guidance around the obligations.*

FUND AND SUPPORT JOINT INDUSTRY INITIATIVES TO IMPLEMENT INDUSTRY-WIDE STANDARD OPERATING PROCEDURES AROUND SEXUAL HARASSMENT

WorkSafe Victoria should develop specific training for employers modelled on the HSR pilot training. VTHC recommends that these specific industry-based packages and trainings should be developed by industry and employer groups and unions for the relevant industry.

This would mean that employers and workers' representatives in specific industries would develop a shared understanding of the risks of sexual harassment in that industry, while also allowing for the development of an industry "Code of Conduct" by agreement. It is critical that these resources and Codes are developed by the people who work in the industry on a day-to-day basis. They are the experts on their systems of work, and this expertise should be jointly leveraged to ensure minimum standards and expectations are set for industry settings. What constitutes sexual harassment risk in one industry will differ significantly from another. For example, the risks to workers in hospitality and other service industries will encompass more customer risk than a construction site. Codes of Conduct could serve as another accountability mechanism under the Act – workers, HSRs and WorkSafe Inspectors could point to the Code when an incident of sexual harassment occurs and establish whether an employer has implemented the guidelines agreed to by the relevant industry bodies. Employers and HSRs could further use Codes of Conduct to develop specific workplace sexual harassment plans, as they would provide guidance on the risks that need to be mitigated and eliminated.

Recommendation 29: *The Victorian Government provides funding to industry and employer groups and unions to develop and implement industry wide standard operating procedures around sexual harassment.*

SUMMARY

The psychological harm inflicted on those who are subjected to sexual harassment must be taken seriously by positive duty holders. The Victorian government can take immediate steps to increase enforcement of these duties in a way that puts the onus squarely back on those who have control over the systems of work and workplace culture that enable sexual harassment. The Victorian government should amend the OHS and EO Act to hold company directors and senior management liable for incidents of sexual harassment in circumstances where they have failed to meet their duties under the respective Acts. Further, the Victorian government should amend the OHS Act to make sexual harassment a notifiable incident under the Act, thereby increasing reporting obligations of employers and reducing a culture of sweeping incidents 'under the rug'. Workers, unions and employer bodies should be enabled to develop joint industry operating procedures, increasing accountability for employers based on a shared understanding of the unique risks of individual industries.

Awareness

In order to tackle sexual harassment in the workplace, there needs to be improved visibility of the prevalence, nature and impact of sexual harassment in both workplaces and across the community. But more than that, workers, employers and community members need to be equipped with the knowledge and skills to take action on sexual harassment.

UNIONS TO DEVELOP AWARENESS RAISING INITIATIVES

Unions have a unique role within workplace structures and as such should have a primary role in developing awareness around sexual harassment and gendered violence in the workplace.

Victorian unions have long led the development of understanding of gendered violence in the workplace, and the wider community. Unions have significant experience leading industry specific campaigns targeted at raising the awareness of, and ending, harassment in the workplace. These campaigns include education on the knowledge and skills for taking action to address the issue. Examples include:

No one deserves a Serve – Shop, Distributive and Allied Employees' Association (SDA)

In 2017, in response to a National survey that found over 85% of them had experienced abuse from customers at work the SDA launched the 'No one deserves a serve" campaign.[23] The major public awareness campaign included television, radio, digital and outdoor advertising in an effort to stop the abuse levelled at retail and fast food staff in the lead up to the busy Christmas period.

In addition to influencing public attitudes and behaviour, the SDA held an industry roundtable in March 2018, in order to drive industry changes and build better protections for retail and fast food workers leading to an industry first joint agreement between employers, shopping centres and unions to eradicate customer abuse.[24]

The 'No one deserves a serve' campaign produced many positive results for retail and fast food workers. A follow-up survey conducted by the Queensland branch of the SDA in 2020 found that 48% of 2500 members have seen positive results in the workplace due to the campaign.[25] There were more than 700 comments from workers detailing the changes that had occurred in their workplace. A further survey of the general public found that, of 1800 respondents, 98% believed that retail and fast food workers deserve a safe and healthy workplace, and the same amount believe retail and fast food companies should strongly support their employees against verbal and physical abuse from customers.[26] On average, respondents were 37% more likely to reconsider how they treat retail and fast food staff after they had seen campaign advertising.[27]

Respect is the Rule - HospoVoice

After an industry survey which found that 89% of women have been sexually harassed while working in the hospitality sector, HospoVoice launched the "Respect is the Rule" campaign.[28] Hospitality workers reported being subjected to sexually suggestive remarks from customers, managers and co-workers, in addition to more allegations of being bullied, groped and threatened. Respect is the Rule was launched across the country calling on venues to adopt a zero-tolerance policy towards sexual harassment. Venues were asked to pledge to:

- Demonstrate zero tolerance including removing patrons who sexually harass staff or patrons
- Promote zero tolerance by displaying a Respect is the Rule window sticker and posters in patron and staff areas
- Establish a contact person for complaints, questions and concerns
- Train managers and staff using the Respect is the Rule training video
- Distribute Respect is the Rule fact sheets to all managers and staff

Both No one Deserves a Serve and Respect is the Rule were developed in conjunction with workers from the industry, with workers' experiences driving the messages communicated.

Awareness raising, like training, should be industry based and led by workers. The Respect@Work report identified a number of workplace settings where sexual harassment is more prevalent:

- Sectors that are considered male-dominated because of:
    a. The gender ratio
    b. The over-representation of men in senior leadership roles
    c. The nature of work being considered 'non-traditional' for women
    d. The masculine workplace culture
- Sectors like retail, hospitality and healthcare that involve a high level of contact with third parties including clients, patients and customers
- Are organised according to a strict hierarchical structure
- Have been found to have a higher prevalence of sexual harassment than across other industries e.g. the arts and recreation industry [29]

As the Taskforce meetings have acknowledged, each industry requires a tailored response to prevention, elimination and awareness raising. Each of these workplace settings will have different risks, workplace cultures and work patterns that drive sexual harassment and gendered violence. As the examples outlined demonstrate, workers and the unions that represent them are uniquely placed to identify the patterns of work that endanger them and to communicate them in ways that industry members, whether employer or worker, will understand. Unions have pre-existing organised structures within workplaces that facilitate this communication from the floor. It is for these reasons that unions should be central to the development of industry specific awareness campaigns.

Recommendation 30: *That the Victorian government should provide unions funding to develop industry-specific awareness campaigns that address the unique risks posed by different industries.*

PUBLIC AWARENESS CAMPAIGNS

VTHC commends WorkSafe Victoria for the Let's Be Very Clear campaign run across digital, print, radio, and social media channels in 2021. Public awareness campaigns like this play an important role in helping develop a community-wide understanding of the specific behaviours that constitute sexual harassment. The increase in calls made to WorkSafe's Advisory Service about 'work-related sexual harassment' and 'workplace bullying' during the period of the campaign demonstrates that increasing the public's understanding of what constitutes sexual harassment enables victims to come forward and report instances of sexual harassment in the workplace.[30]

It is the view of VTHC that WorkSafe should relaunch the Let's Be Very Clear campaign as a long-running campaign akin to the successful Valuing Safety advertisements run across TV during the early 2000s, which ingrained the concept of workplace safety in the public psyche. Doing so would establish a solid community understanding of not only what constitutes sexual harassment in the workplace, but also inextricably tie that to the understanding of occupational health and safety. The campaign should target specific high-risk industries like the original trial period but should extend across mainstream media to reach the public more generally. Content of the campaign

should also be strengthened by including action-focused education on how to report and rectify sexual harassment, and the obligations and duties of employers in relation to breaches.

Recommendation 31: *That WorkSafe should relaunch Let's Be Very Clear campaign as a long-running multi-media campaign.*

WORKPLACE SEXUAL HARASSMENT EDUCATION FOR YOUNG WORKERS

The Respect@Work report made key recommendations in relation to educational support needed for women entering the workforce:

> *Recommendation 9: educational resources for young people of working age around sexual harassment and workplace rights should be identified and promoted for use in schools;*
>
> *Recommendation 11: that training should be provided for staff and students in tertiary and higher education around sexual harassment, including content on workplace rights.*

VTHC currently operates the Young Workers Centre (YWC). The YWC was established by VTHC and affiliated unions in 2015 as a mechanism for creating safer, fairer workplaces for young people aged 30 and under. The YWC is committed to supporting, educating, empowering and organising young people in workplaces across Victoria.

The YWC is currently funded by the Victorian government to develop and implement a workplace rights education program. The YWC education program trains young people in high schools, TAFEs and other community programs about safety, bullying and their rights at work. Training is designed to prepare young people for work before their first job and support them navigating their early working years. Modules include:

- Occupational Health and Safety
- Bullying and Discrimination
- Your Rights At Work

Since the YWC was founded, training has been delivered to more than 33,000 young Victorians. More recently, the YWC has developed a combined module aimed specifically at apprentices in response to an increase in enquiries from apprentices who reported being bullied, harassed and underpaid at work.

The YWC is uniquely placed to develop and deliver specific sexual harassment educational modules for young workers in schools and higher education. It has established networks, educational formats and a fundamental understanding of industrial relations frameworks that would enable them to credibly deliver training in schools, TAFEs and other youth community organisations. The Bullying and Discrimination module already touches on sexual harassment, but the Victorian government should fund the YWC to develop and deliver a specialist sexual harassment module designed to educate young workers about the risks of sexual harassment in the workplace, their rights under the OHS and EO Acts, and their options for recourse.

Recommendation 32: *The Victorian government should fund the Young Workers Centre to develop an education module on workplace sexual harassment for rollout at schools across Victoria.*

Recommendation 33: *The Victorian government should include education on sexual harassment and workplace rights in the Victorian Curriculum.*

SUMMARY

Workers, employers and community members should be empowered with the knowledge and skills to identify and address sexual harassment in the workplace. As experts in their workplaces, workers and their representatives are uniquely placed to develop awareness campaigns and educational tools that speak directly to the industries they come from. Unions have significant experience doing this work already and should be resourced appropriately to develop industry-specific awareness campaigns in conjunction with workers.

The Victorian government and WorkSafe can also play an important role in increasing awareness around and knowledge of workplace sexual harassment by relaunching an expanded Let's Be Very Clear campaign, and facilitating the education of young workers before they enter the workforce about their rights and obligations in relation to sexual harassment.

CONCLUSION

Sexual harassment is an unacceptable cultural problem across Victorian workplaces. It poses significant risks to the health and safety of workers, and for too long it has been swept under the rug. This must end as a matter of urgency.

Addressing sexual harassment requires dismantling the systems of work and culture that enable it. It is important to interrogate how we do work, who does what work and who has power and control over decision-making in the workplace. It will only be achieved through collective action. Workers and their representatives are key to this, but the Victorian government has a major role to play in setting community and OHS standards, working in partnership with unions and employers and with the engagement and input from workers at every level to eliminate sexual harassment from our workplaces.

Every worker, no matter their background, should be safe from sexual harassment and gendered violence. Only together can we make this happen.

Recommendations

PREVENTION

Recommendation 1: *Make the VTHC 'HSR Refresher Training Course - Work-related gendered violence including sexual harassment' accessible for all HSRs by amending s67 of the OHS Act to give HSRs the right to attend at least two refresher trainings in a year.*

Recommendation 2: *Amend the current '5-day HSR Initial OHS Training Course' to include specific content addressing work related gendered violence.*

Recommendation 3: *Require all WorkSafe inspectors to undertake Gendered Violence training that equips inspectors with the knowledge and resources they need to deal with sexual harassment allegations. This training should be developed in conjunction with VTHC.*

Recommendation 4: *WorkSafe, in conjunction with unions and industry representatives, develops OHS training specifically focused on the powers given to HSRs under the OHS Act, in addition to their own obligations under the Act.*

Recommendation 5*: WorkSafe Victoria should establish a women-dominated, multi-disciplinary inspectorate and prosecution unit with responsibility for investigation and enforcement of sexual harassment and gendered violence.*

Recommendation 6: *That WorkSafe Victoria elevates the WorkSafe Guide 'Work-related gendered violence including sexual harassment' into a Compliance Code.*

Recommendation 7: *The Victorian government should review procurement guidelines to require any business who wants to receive taxpayer funds in any form to meet minimum requirements around gender equality and sexual harassment.*

Recommendation 8: *The Victorian government reviews procurement guidelines to ensure that any contracting party that does not comply with gender equality and sexual harassment requirements faces penalties up to and including termination of contract.*

Recommendation 9: *State licenses require license-holders to attend gendered violence training and show evidence of a workplace gendered violence policy and process.*

Recommendation 10: *Ensure that license-holders who breach gendered violence policy and process requirements are subjected to accountability processes.*

Recommendation 11: *The Victorian Government should amend relevant regulations to ensure that designated entities are required to include mandatory clauses in their enterprise agreements that align with the requirements in the Gender Equality Act, and to implement a sexual harassment plan.*

Recommendation 12: *The Victorian government legislates to ban all non-disclosure agreements in cases of workplace sexual harassment and discrimination, other than those requested by victim-survivors to protect their own confidentiality.*

SUPPORT

Recommendation 13: *The Victorian government funds the establishment and operation of a Working Women's Centre at VTHC to provide advocacy and support to victim-survivors in collaboration with the union movement.*

Recommendation 14*: WorkSafe to be funded to conduct a restorative justice pilot, aimed at achieving reconciliation as well as rectification of the system failure that has led to the sexual harassment incident/s.*

Recommendation 15: *That the Victorian Government amends the OHS to increase the penalties for the victimisation of a complainant.*

Recommendation 16: *WorkSafe Victoria charges its inspectorate and prosecution units with a focused drive to enforce the prohibition on discrimination as established under section 76 of the OHS Act.*

Recommendation 17: *WorkSafe, in conjunction with unions and relevant organisations, develops guidance materials for employers on how to deal with perpetrators of sexual harassment in the workplace effectively so that a complainant is not disadvantaged for making the complaint.*

Recommendation 18: *The Victorian Government should implement legislative adjustments to enable workers and unions to initiate civil remedy proceedings for breaches of the OHS Act, including the creation of a Costs Fund for such claims.*

Recommendation 19: *The Victorian Government amends the EO Act and VCAT Act to allow for unions to commence representative claims on behalf of members, including in relation to the enforcement of the positive duty.*

Recommendation 20: *That a Costs Fund be established as per the principles discussed above to support such claims.*

Recommendation 21: *The Victorian Government should advocate for the Federal government to implement all 55 recommendations of the Respect@Work report.*

Recommendation 22: *The Victorian Government should advocate for the ability of a worker to bring a claim of sexual harassment to the Fair Work Commission for remedy.*

Recommendation 23: *The Victorian Government extend industrial relations powers referred to the Commonwealth to bullying and sexual harassment matters, allowing public sector employees to apply for orders or seek other remedies at the Fair Work Commission.*

Recommendation 24: *The Victorian government should require employers to report the outcome of investigations to victim-survivors of sexual harassment.*

ENFORCEMENT

Recommendation 25: *That the Victorian government legislates to hold company directors and senior management liable for incidents of sexual harassment in circumstances where it is found that they have failed to meet their obligations under the EO Act to take proactive measures to address sexual harassment and under the OHS Act to create a safe workplace.*

Recommendation 26: *Regulations under section 158 of the OHS should be amended immediately to require employers to report de-identified data on sexual harassment incidents to WorkSafe on a quarterly basis.*

Recommendation 27*: That WorkSafe investigates a mechanism for making de-identified data on sexual harassment incidents reported under section 158 of the OHS accessible by the public.*

Recommendation 28: *The Victorian Government should amend section 37 of the OHS to require workplace sexual harassment to be a notifiable incident under the Act, and develop subsequent clear guidance around the obligations.*

Recommendation 29: *The Victorian Government provides funding to industry and employer groups and unions to develop and implement industry wide standard operating procedures around sexual harassment.*

AWARENESS

Recommendation 30*: That the Victorian government should provide unions funding to develop industry-specific awareness campaigns that address the unique risks posed by different industries.*

Recommendation 31: *That WorkSafe should relaunch Let's Be Very Clear campaign as a long-running multi-media campaign.*

Recommendation 32: *The Victorian government should fund the Young Workers Centre to develop an education module on workplace sexual harassment for rollout at schools across Victoria.*

Recommendation 33: *The Victorian government should include education on sexual harassment and workplace rights in the Victorian Curriculum.*

ENDNOTES

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29. Respect@Work, Executive Summary.
30. According to data presented by WorkSafe during Taskforce meetings.

AN BILLE UM CHOMHIONANNAS FOSTAÍOCHTA (LEASÚ) (COMHAONTUITHE NEAMHNOCHTA), 2021
EMPLOYMENT EQUALITY (AMENDMENT) (NON-DISCLOSURE AGREEMENTS) BILL 2021

Bill

entitled

An Act to restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination.

Be it enacted by the Oireachtas as follows:

Interpretation

1. In this Act—

"Minister" means the Minister for Children, Equality, Disability, Integration and Youth;

"non-disclosure agreement", means a provision in writing in an agreement, however described, between an employer and an employee whereby the latter agrees not to disclose any material information about the circumstances of a dispute between them concerning allegations of sexual harassment or discrimination which are unlawful under this Act;

"Principal Act" means the Employment Equality Act 1998;

"relevant employee" means the employee who has experienced or made allegations about the sexual harassment or discrimination;

"relevant individual" means the person who committed or is alleged to have committed the sexual harassment or discrimination.

Amendment of Principal Act

2. The Principal Act is amended by the insertion of the following section after section 14A:

"Non-disclosure agreements

14B. (1) Other than in accordance with subsection (2), an employer shall not enter into a non-disclosure agreement with a relevant employee where—

(a) the employee has experienced or made allegations of sexual harassment (within the meaning of section 14A), or

(b) the employee has experienced or made allegations of discrimination which are unlawful under this Act,

and the non-disclosure agreement has the purpose or effect of concealing the details relating to a complaint of discrimination or harassment under paragraphs (a) or (b).

(2) An employer may only enter into a non-disclosure agreement with a relevant employee in accordance with this section if such an agreement is the expressed wish and preference of the relevant employee concerned.

(3) Where an agreement is made under subsection (2), the agreement shall only be enforceable where—

(a) the relevant employee has been offered independent legal advice, in writing, provided at the expense of the employer,

(b) there have been no undue attempts to influence the relevant employee in respect of the decision to include a confidentiality clause,

(c) the agreement does not adversely affect—

(i) the future health or safety of a third party, or

(ii) the public interest,

(d) the agreement includes an opportunity for the relevant employee to decide to waive their own confidentiality in the future, and

(e) the agreement is of a set and limited duration.

(4) An employer may not enter into a separate non-disclosure agreement solely with the relevant individual where the agreement has the purpose or effect of concealing the details of a complaint relating to the sexual harassment or discrimination concerned.

(5) Where a non-disclosure agreement following an incident of workplace sexual harassment or discrimination is made that does not comply with subsections (3) or (4), that agreement shall be null and void.

(6) An employer who enters into a non-disclosure agreement after the coming into operation of this section that is not made in accordance with this section is guilty of an offence.

(7) Where a non-disclosure agreement was made before the coming into operation of this Act, it shall only be enforceable if it was made in accordance with subsection (3), save for any provisions protecting the identity of the relevant employee, which shall remain in effect.

(8) An agreement made in accordance with subsection (2) shall not apply to—

(a) any disclosure of information under the Protected Disclosures Act 2014, or

(b) any communication relating to the harassment or discrimination between the relevant employee and:

(i) An Gardai Síochána;

(ii) a legal professional;

(iii) a medical professional;

(iv) a mental health professional;

(v) a relevant State regulator;

(vi) the Office of an Ombudsman;

(vii) the Office of the Revenue Commissioners;

(viii) a prospective employer; or

(ix) a friend, a family member or personal supporter.

(9) An agreement made under subsection (2) shall, insofar as is possible, be written in plain English.

(10) The Minister shall make regulations to provide for the standard form for an agreement to be made under subsection (2) and for any other purpose to enable this Act to have full effect.

(11) The Minister shall publish guidelines for employers, employees and legal professionals to aid compliance with this section.

(12) In this section, all references to a non-disclosure agreement shall be taken to also reference non-disparagement agreements where a non-disparagement agreement has the effect or purpose of concealing details relating to an incident of sexual harassment or discrimination.".

Short title and commencement

3. (1) This Act may be cited as the Employment Equality (Amendment) (Non-Disclosure Agreements) Act 2021.

(2) This Act comes into operation three months after its passing or on such earlier day as the Minister may appoint by order.

An Bille um Chomhionannas Fostaíochta (Leasú) (Comhaontuithe Neamhnochta), 2021

BILLE

(mar a tionscnaíodh)

dá ngairtear

Acht do chur srian le húsáid comhaontuithe neamhnochta mar a bhaineann siad le teagmhais ghnéaschiaptha agus idirdhealaithe san áit oibre.

Na Seanadóirí Lynn Ní Ruadháin, Proinséas Ní Dhuibh, Eileen Ní Fhloinn agus Alice-Mary Ní Uiginn a thug isteach,

1 *Meitheamh,* 2021

Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021

BILL

(as initiated)

entitled

An Act to restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination.

Introduced by Senators Lynn Ruane, Frances Black, Eileen Flynn and Alice-Mary Higgins,

1*st June,* 2021

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