



19 May 2021

Policy Reform & Legislation,
Department of Communities and Justice,
GPO Box 6,
SYDNEY NSW 2001

To Attorneys-General,

RE: SUBMISSION TO THE REVIEW OF MODEL DEFAMATION PROVISIONS

The Victorian Trades Hall Council (VTHC) welcomes the opportunity to make a submission to the Review of Model Defamation Provisions.

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 to speak up about malpractice and mistreatment in the workplace, including sexual harassment, bullying, and gendered violence.

This submission speaks specifically to Part B of Stage 2 of the Review, which is concerned with whether defamation law has a chilling effect of reporting criminal behaviour or misconduct to police, investigatory bodies, and professional disciplinary bodies.

In consultations and submissions, the Sex Discrimination Commissioner's Respect@Work Inquiry heard that Australia's defamation laws discourage sexual harassment victims from making a complaint or reporting incidents.¹ This is a major concern, given the prevalence of sexual harassment and its harmful effects on gender equality, and health and safety, especially in workplaces. According to 2017 research at VTHC, 64% of women said they experienced bullying, harassment or violence in their workplace.² Model Defamation Provisions must be improved to better protect sexual harassment victims, especially around incidences of sexual harassment in the workplace, and prevent defamation from being utilised by perpetrators to escape scrutiny.

VTHC argues that Attorneys-General should consider extending absolute privilege to reports of sexual harassment made to police and investigatory bodies, especially bodies that investigate allegations of misconduct or negligence in workplaces, which include the Fair Work Ombudsman at the national level and Industrial Relations Commissions, WorkSafe (including inspectors and Health and Safety Representatives), and Wage Inspectorates at state level. Workers who are victims of workplace rights breaches (including sexual harassment) must be able to seek justice through the relevant investigatory bodies. In Victoria, where wage theft is a criminal offence, the ability to report criminal behaviour without fear of legal retaliation from financially powerful employers must be protected by law. The prospect of drawn-out legal action where the alleged victim must defend themselves under qualified privilege puts working people not only at financial and psychological risk, but will likely deter them from reporting on the incident at all. This would undermine Victorian wage theft laws that seek to act as a strong deterrent for wage theft.

¹ Jenkins, K. (2020), 'Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces', Australian Human Rights Commission, accessed: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>, p. 33.

² VTHC (2017), 'Stop Gendered Violence At Work', Victorian Trades Hall Council, accessed: https://d3n8a8pro7vymx.cloudfront.net/victorianunions/pages/4164/attachments/original/1511416569/Stop_GV_At_Work_Report_2017.pdf?1511416569

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Attorneys-General should also consider the merits of extending absolute privilege to reports of sexual harassment made to professional disciplinary bodies. Workers who experience sexual harassment or other misconduct at work must be empowered to speak up, especially where the alleged perpetrator's behaviour is in breach of codes of conduct or professional standards. This may be a powerful lever to tackle industries where gendered violence is prevalent and deeply-rooted, such as in the health industry.

VTHC also argues that Model Defamation Provisions must provide stronger protections for informal channels of reporting sexual harassment. Given the lack of faith in formal complaints processes, informal reporting mechanisms must be strengthened to ensure laws do not entrench existing perceptions that it is risky to speak up. Only 17% of victims make a formal complaint within their workplace about sexual harassment at work and 45% of that subsection said nothing changed in their workplace after making a complaint.³ To improve protections for victims of sexual harassment when allegations are raised in circumstances where they have not made a formal complaint, VTHC supports Recommendation 39 in the Respect@Work Report, which recommends that consideration be given to introducing protections for witnesses in this situation.⁴ Measures could include a standard direction or presumption in favour of suppression of witness details in defamation proceedings, where the defamatory material includes allegations of sexual harassment.

As the Respect@Work Report also notes, the media has an integral role to play in exposing sexual harassment and improving community understanding of sexual harassment, with the informed consent of the victim.⁵ The Report highlighted that defamation decisions that find against a victim of sexual harassment can not only have a silencing effect on discussion and reporting, but also further entrench public perceptions of the risks of speaking up. Model defamation provisions should be enhanced to the effect that the public interest test is applicable to reports of sexual harassment.

Model defamation provisions must also be amended to provide certainty that the disclosure of sexual harassment or bullying claims for the purposes of getting workplace rights advice are immune from legal action. Reporting incidents of sexual harassment and bullying to trade unions and community legal centres must be protected in order not to infringe on workers' ability to learn their rights and seek justice.

Cultures of bad behaviour grow when perpetrators of sexual harassment are protected from consequences, especially when the perpetrator holds more financial and social power as an employer or manager. The Review of Model Defamation Provisions is an opportunity to ensure defamation laws are not used as a weapon of the powerful to silence victims of sexual harassment.

If you have any questions or would like further information, please do not hesitate to contact Politics and Research Lead, Ted Sussex, at [REDACTED].

Yours sincerely,

[REDACTED]

Wil Stracke
Assistant Secretary
Ref: WS:JK 92.32

³ Australian Human Rights Commission (2018), 'Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces', Australian Human Rights Commission, p. 77.

⁴ Ibid, p. 48.

⁵ Ibid, p. 414.

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