

28 February 2019

Kate Jenkins
Sex Discrimination Commissioner
GPO Box 5218
SYDNEY NSW 2001



Dear Commissioner Jenkins,

RE: AUSTRALIAN HUMAN RIGHTS COMMISSION INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES

On behalf of the Victorian Trades Hall Council (VTHC) I welcome the opportunity to provide a submission to this important Inquiry.

VTHC notes the essential nature of this inquiry, and the alarming frequency with which the substantive issues of this inquiry affect women workers and workers who do not conform to gender stereotypes or socially prescribed gender roles.

The Women's and Equality Team based out of VTHC frames the issue of sexual harassment around gendered violence, and provides recommendations based on our work arresting the shocking rates at which women workers are subjected to gendered violence.

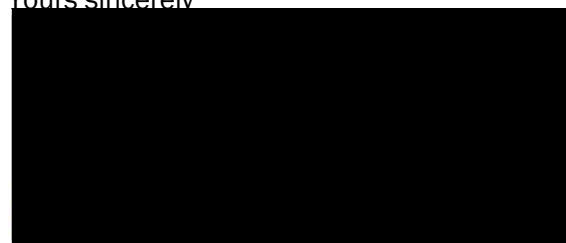
Since its inception, the union movement has fought for the rights and safety of all workers, no matter their employment status, gender, race or sexuality. Making workplaces safe for all workers is core to our work, and vital to union members across Victoria.

We look forward to your recommendations and the subsequent corrective actions that will be taken to combat gendered violence in Australia's workforce.

If you have any questions or would like further information, please do not hesitate to contact co-leads of the Women's & Equality Team, Jodi Peskett or Pia Cerveri on (03) 9659 3511.

Thank you for your consideration.

Yours sincerely



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Victorian Trades Hall Council

Submission to the Human Rights Commission Inquiry into Workplace Sexual Harassment

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1. Introduction:

1.1 About VTHC:

The Victorian Trades Hall Council (VTHC) was founded in 1856 and is the peak body for unions in Victoria. VTHC represents 40 unions and over 430,000 workers in Victoria. These workers are members of unions that reach into every industry in the state, both in the public and private sectors.

Since gaining the Eight Hour Day in April 1856, VTHC has had a long history of fighting for and defending the rights of workers in Victoria. The importance of winning the Eight Hour Day is significant not just in Australia but worldwide. Few advances in the quality of life for working people would have been achieved without the involvement of the Victorian union movement.

Over the last 150 years, VTHC and its affiliated unions have campaigned for and successfully won a range of important rights and entitlements for Victorian (and Australian) workers, including:

- Minimum wage
- Penalty rates
- Collective bargaining rights
- Freedom of association and the right to representation
- Occupational Health and Safety (OHS) protections
- Annual, sick, and carer's leave
- Maternity and parental leave
- Domestic violence leave
- Superannuation
- Protections from unfair dismissal and redundancy entitlements
- Long service leave

VTHC will continue to campaign tirelessly for the rights, entitlements and protections of workers in Victoria, no matter their gender, sexuality, employment status, employer, or workplace.

1.2 VTHC Action for Working Women

VTHC now has a team dedicated to leading the Victorian union movement's strategies to advance the rights and safety of working women and achieve gender equality in our workplaces. Workers of all genders and sexualities should be safe and respected at work and able to achieve their full potential. Recognising that discrimination of LGBTIQ+ workers is often grounded in the same inequalities and attitudes that impact women workers; part of the team includes dedicated resources to educating these workers about their safety and rights.

VTHC has had specific resources, in the form of a dedicated Women's Officer, committed to affirmative strategies for women workers since the 1990s. Since that time, VTHC has introduced many successful strategies to engage women workers and seek advances in their rights at work.

These strategies include:

- Coordinating the highly successful Anna Stewart Memorial Program, a two-week mentoring program for women activists designed to provide them with the skills that will increase their

capacity to take leadership roles within their unions, at their workplaces and in their communities. This is done twice a year.

- Women workers conferences and actions, including Feminism in the Pub, designed to explore issues of importance and develop strategies for the trade union movement to respond to these issues.
- Women's Rights At Work (WRAW) Chats; an organising tool that gathers information on the issues women face at work and empowers workers to organise around these issues. WRAW Chat data has been used to inform VTHC's campaigning on issues for Victorian women workers.
- State wide and national campaigns on maternity leave, paid parental leave, childcare, remuneration equity, casual and insecure work, occupational violence and sexual harassment.
- Leading, in conjunction with our affiliate the Australian Services Union (ASU) Victoria Tasmania Branch, a campaign to gain national recognition of paid family and domestic violence leave (FDVL) as a workplace entitlement.
- Working with WorkSafe to recognise gendered violence as an occupational work health and safety hazard and develop gendered violence guidelines.
- Developing gendered violence OHS training and refresher training, piloted in 2018.
- Training union affiliates across all industries and sectors in gendered violence and family violence.
- Lobbying governments on women's equality, including 'Turn Parliament Purple', which took over 60 women workers from across industries to speak to State MPs about women's issues at work.

This submission is intended to support the recommendations made by the Australian Council of Trade Unions (ACTU) and other unions.

VTHC strongly endorses the recommendations of the ACTU, and emphasises that women workers must have clear and enforceable rights when it comes to sexual harassment and other forms of gendered violence, and these must result in claims with action in the Fair Work Commission. The current individualised nature of the complaint systems is not accessible for vulnerable workers. New work health safety (WHS) regulations must be developed to reverse the onus of proof so that it is the employer's obligation to provide a safe workplace, free of sexual harassment and other forms of gendered violence.

In addition, this submission seeks to build on the body of work developed by the union movement in regards to sexual harassment at work through the prism of gendered violence. VTHC argues that addressing gendered violence at work requires an OHS framework.

2. VTHC's Premise: Sexual Harassment is Gendered Violence

Research conducted by VTHC demonstrates women workers are subjected to gendered violence, which is pervasive in our workplaces.¹

Gendered violence is any behaviour, action, system or structure that causes physical, sexual, psychological or economic harm to a worker because of their sex, gender, sexual orientation or because they do not adhere to dominant gender stereotypes or socially prescribed gender roles.

¹ Stop Gendered Violence at Work Report: Women's Rights at Work Report (2016) Victorian Trades Hall Council

Any worker can experience gendered violence at work, however, there are groups of workers who experience higher rates of gendered violence and who are at an increased risk, such as women, workers who identify as LGBTQIA+, refugee and migrant workers, workers with disabilities, Aboriginal and Torres Strait Islander workers and undocumented workers.

Examples of gendered violence include but are not limited to:

- Stalking
- Intimidation
- Offensive language and imagery
- Physical assault including sexual assault and rape
- Ostracism and exclusion
- Put downs, innuendo and insinuations
- Being undermined in your work or position
- Verbal abuse and rude gestures

Sexism, misogyny, homophobia and gender inequality are the root causes of gendered violence. It is the resulting unequal power relations and dominant socially prescribed gender norms that underpin the pervasiveness of gendered violence. Dismantling systems that create and re-enforce gendered violence are central to addressing sexual harassment and creating gender equality in the workplace.

Sexual harassment is one form of gendered violence. However, to effectively address the issue of sexual harassment, this Inquiry must also look more broadly at gendered violence and consider measures to address gender inequality and gendered violence in the workplace. Recent events such as the #MeToo movement and International Labour Organisation (ILO) processes to set a new international standard on violence and harassment, including gendered violence in the world of work,² has brought the issue of sexual harassment to the fore. As such, this inquiry presents an opportunity and responsibility to expand our understanding of sexual harassment and address the root causes of this and other forms of gendered violence.

Gendered violence is a serious workplace health and safety hazard which harms workers by causing physical and psychological injuries. The injuries caused by gendered violence are similar to those caused by other forms of bullying, harassment and occupational violence.

Gendered Violence injures workers by causing or contributing to:

- Physical injury and illness
- Anxiety
- Loss of confidence and withdrawal
- Suicide
- Social isolation, family dislocation
- Stress
- PTSD (post-traumatic stress disorder)³

Gendered violence exists in all industries and is endemic in Victorian workplaces, with 64% of Victorian working women reporting having experienced gendered violence at work.⁴ In addition to

² Minutes of the 325th Session of the Governing Body of the International Labour Office, 325th sess, GB. 325/PV, 10

³ Stop Gendered Violence at Work Report: Women's Rights at Work Report (2016) Victorian Trades Hall Council

⁴ Ibid

the high rates of gendered violence, 19% of Victorian working women reported resigning from a workplace because they did not feel safe.⁵

The experience of Victorian working women is consistent with those of women internationally. The international Trade Union Congress (ITUC) reports that worldwide 35% of women experience direct violence in the workplace and between 40–50% experience unwanted sexual advances, physical contact or other forms of sexual harassment.⁶ Further information about Victorian working women’s experiences of gendered violence at work can be found in the VTHC 2016 ‘Stop Gendered Violence Report.’⁷

In this submission, VTHC will focus on the issue of gendered violence at work for working women and workers who do not conform to societal norms around gender. Recommendations will encompass changes that need to be made to the *Sex Discrimination Act* (SDA).

In addition to VTHC research, unions report that women workers frequently experience gendered violence. Data from the Human Rights Commission (HRC) demonstrates that 78% of complaints arising from the SDA relate to employment.⁸ The problem is exacerbated for workers in the LGBTIQ+ and migrant communities. As such, this submission will also consider how workplace laws and policy need to change in order to make women workers safer, and therefore include recommendations pertaining to the *Fair Work Act* (FWA).

2.1 The Causes of Gendered Violence

Gendered violence at work is inter-related to violence against women, including domestic and family violence. Research consistently shows that Australian women experience male violence at epidemic levels. A third of all women have experienced physical or sexual violence.⁹ Women are more likely to experience violence at home; as 1 in 6 Australian women have experienced physical or sexual violence from a current or former partner, resulting in, on average, one woman being murdered by a current or former partner a week.¹⁰ The streets are not a refuge, with 1 in 10 women experiencing violence by a stranger.¹¹

This violence has dire impacts. Intimate partner violence is the greatest health risk factor to women aged 25-44.¹² Nearly 27% of people admitted to hospital due to assault injuries listed the perpetrator as a spouse or domestic partner, or other family member.¹³ Women were four times more likely than men to be hospitalised for assault, and in particular, young women were most likely to hospitalised due to being assaulted by a partner.¹⁴

As a consequence of this, women also experience anxiety or fear due to violence. Nearly half of all women who are currently experiencing family or domestic violence report suffering anxiety, and

⁵ Ibid

⁶ ITUC: Statement on the occasion of the United Nations International Day for the Elimination of Violence against Women, 24 November 2015, <http://www.ituc-csi.org/ituc-statement-on-the-occasion-of>

⁷ Stop Gendered Violence Report: Women’s Rights at Work Report (2016) Victorian Trades Hall Council

⁸ 2016-2017 Complaint Statistics, Australian Human Rights Commission

⁹ Australian Bureau of Statistics (ABS) 2017, Personal Safety, Australia, 2016, ABS cat. no. 4906.0 Canberra: ABS

¹⁰ Australian Institute of Criminology (AIC) 2017 The 2017 National Homicide Monitoring Program

¹¹ Australian Bureau of Statistics (ABS) 2017, Personal Safety, Australia, 2016, ABS cat. no. 4906.0 Canberra: ABS

¹² Australian Institute of Health and Welfare (AIHW) 2018. Family, domestic and sexual violence in Australia 2018. Cat. no FDV 2. Canberra: AIHW

¹³ Ibid

¹⁴ Ibid

65% of women who have experienced partner violence previously, report suffering anxiety, with half of this group feeling anxious all of the time.¹⁵ This impacts on a woman's capacity to work.

The rates of violence against women in Australia are alarming. They warrant immediate and emergency action. Not one woman should be subjected to violence, and this attitude must form the basis of a national response.

According to evidence from OurWatch, disrespect for women, gender inequality, and adherence to rigid or stereotypical gender roles, relations, and identities drive high levels of violence against women.¹⁶

This includes the gendered violence that women experience at work.¹⁷ Statistics show that gender roles and gender inequality are alive and well in Australian workplaces. A key indicator of this is the gender pay gap, which has sat between 15 and 20% over the last twenty years, with little sign of budging.¹⁸

The workforce is also highly segregated due to gendered perceptions around roles and responsibilities. Women spend between five and fourteen hours on domestic housework per week, compared to the average man spending less than five hours a week.¹⁹ Coupled with women's high part-time and casual employment rates,²⁰ this demonstrates a clearly persistent division of labour between the genders. Further, women workers are much more likely to be in lower paid industries like aged or disability care, early childhood education or retail.²¹

The effects of gendered violence are compounding throughout women's working lives. On average, women retire with a superannuation pay gap of 40%.²² The median women's retirement fund is \$36,000 compared to a man's \$110,000.²³

Women workers reported to VTHC that the attitudes that underpin these kinds of gender gaps also underpin gendered violence at work. One quarter (23%) of respondents felt they are treated without respect at work, and 60% reported feeling "unsafe, uncomfortable or at risk" in their workplace.²⁴

LGBTIQA+ and gender non-conforming union members also report being subjected to and harmed by gendered violence. Research about these workers is more limited, however it is clear they face discrimination at work. For example, according to the Australian Workplace Equality Index (AWEI), 15% of gender diverse workers were negatively impacted by attitudes towards them in the workplace. Of the 6.5% who were bullied, two-thirds considered leaving their current place of work because of it.²⁵ Leadership and management were unlikely to address the problem, with only 5.9% being made aware.²⁶ Further, 52.8% of LGBTIQA+ workers had been subjected to harassment or

¹⁵ Australian Bureau of Statistics 2017. Personal Safety, Australian, 2016, ABC cat. no. 4906.0 Canberra: ABS

¹⁶ OurWatch (2015) Change the Story: A shared framework for the primary prevent of violence against women and their children in Australia, p 8

¹⁷ Ibid

¹⁸ Workplace Gender Equality Agency (2018), Australia's Gender Equality Scorecard: Key findings from the Workplace Gender Equality Agency's 2017-18 Reporting Data

¹⁹ Ruppanner, L (2017) 'Census 2016: Women are still disadvantaged by the amount of unpaid housework they do', *The Conversation*

²⁰ Workplace Gender Equality Agency (2018), Australia's Gender Equality Scorecard: Key findings from the Workplace Gender Equality Agency's 2017-18 Reporting Data, p 17

²¹ Ibid, p 16

²² Hetherington, D & Warwick, S (2017) 'Not So Super, For Women: Superannuation and Women's Retirement Outcomes,' Australian Services Union (ASU) in partnership with PerCapita

²³ Ibid

²⁴ Stop Gendered Violence at Work Report: Women's Rights at Work Report (2016) Victorian Trades Hall Council, p 3

²⁵ Australian Workplace Equality Index 2016 Employee Survey Analysis (2016) Pride in Diversity, p 6

²⁶ Ibid, p 25

discrimination at work, and 21.7% had been outed at work against their will.²⁷ A US-based study concluded that behaviours such as these are damaging, and have ‘harmful effects on quality of life and indicators of psychiatric morbidity...’²⁸

Similarly, research on the experiences of women migrant workers in Australia is lacking. However, it is clear that migrant workers are some of the most economically vulnerable in Victoria. Migrant workers are over-represented in some of the lowest paid and most vulnerable industries, such as manufacturing, accommodation and food services, health care and social assistance, and agriculture. Migrant workers make up double the Australian born workers in occupations such as housekeepers and cleaners.²⁹ These industries are also highly feminised. The trade unions representing these industries know that migrant women workers face gendered violence on top of the exploitation also commonly experienced by their male counterparts.

While the attitudes and systems that cause gendered violence are complex to undo, VTHC argues that more action can and must be taken.

2.2 Gendered Violence Case Study

A union organiser provided a story from one of their members who has been forced to deal with the issues of gendered violence, the legal recourse available, and the issue of vulnerability. Due to legal proceedings, certain details have been redacted.

In 2013, a site delegate from the catering division of [Redacted] contacted the National Union of Workers (“NUW”) regarding a female member (“Complainant”) who had been sexually harassed in the workplace over the past year.

The member was a labour hire worker who has been working at the warehousing site for approximately five years. In July 2012, the manager of the host employer started making unwanted sexual advances towards her over a nine-month period, including inappropriate sexual texts, taking photos of her bending over and inviting her to join him for drinks in his home spa.

On one occasion, the manager requested that she come with him to sites other than the warehouse. However, the manager did not take them to the other work location, instead he just drove around with the Complainant in the car and started talking about permanent and direct roles coming up and that she should apply for them. He then started asking the member what she was doing after work, invited her to his house and said he would like to have a sexy girlfriend like her. The manager continued to harass her about his ‘offers’ by text messages over the coming weeks. The Complainant did not respond. After this incident the Complainant was extremely humiliated and found it incredibly difficult to go to work.

The Complainant told some colleagues about the harassment and they encouraged her to report it, but she was too scared she would lose her job, as a labour hire casual.

In November 2012, the Complainant was interviewed for a permanent role by the same manager who has been harassing her. The member described the experience as horrendous. She was not successful in getting a permanent role with the Company during this, or other interviews with the same manager.

²⁷ Working it Out (2017) ‘In the Workplace’ <<http://www.workingitout.org.au/in-the-workplace/>>

²⁸ May, V (2001) ‘Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States’, *American Journal of Public Health* 91(11)

²⁹ Department of Immigration and Border Protection, ‘The Place of Migrants in Contemporary Australia: A Summary Report’ July 2014

In or around 2013, with the support of her Union delegate, the Complainant made an internal complaint and the Company investigated it. The complaints of sexual harassment were substantiated by the Company. Despite this, the Manager remained in his current role and the Complainant was required to interact with him in her role. The Complainant returned to work for a period after the finalisation of the investigation, however, the Complainant was unable to remain at work after her and her colleagues were required to attend sexual harassment training run by the same manager who had sexually harassed her.

Subsequent to this, the Complainant could not return to work and the NUW escalated the matter. Approximately 70 other NUW members signed a petition about the treatment of Complainant (and other staff) by the manager.

This matter was settled following a conciliation at the AHRC. The settlement is subject to confidential deed. The perpetrator continued in his role.

The remainder of this submission will be dedicated to practical solutions and recommendations to uphold the rights and safety of women workers, and workers experiencing gendered violence at work. It addresses changes that must be made to the SDA, including measures to keep workers safe through their unions, and draws on workers' stories and the case study to highlight the extent of the problem. It therefore extends to recommendations pertaining to the FWA and the need for compliance mechanisms.

3. Taking Action on Gendered Violence

Recommendation 1: Change the definition of Sexual Harassment to Gendered Violence

Under the SDA, section 28A sets out the definition of 'sexual harassment' as to '[make] an unwelcome sexual advance, or an unwelcome request for sexual favours...' or engage 'in other unwelcome conduct of a sexual nature.' The section deems factors such as sex, age, sexual orientation and gender identity, as well as race and the relationship to the person doing the harassing to be relevant and should be considered.³⁰

We contend this definition is far too narrow to encapsulate the kind of violence that women workers are subjected to. WRAW Chat data demonstrates that there are deeply held attitudes of disrespect for women at work and these can manifest in a number of ways.³¹ For example, 23% of women workers in Victoria reported that they do not feel they are treated with respect at work.³² Working women also reported feeling demeaned by offensive language or imagery and ostracised.³³

"My boss would always tell all the girls to wear tiny shorts to look "sexy" for the customers and things like that – just completely inappropriate and objectifying, that none of the guys would hear, a lot of whom actually got paid more than us."

- United Voice Member

These scenarios do not fit within the current definition of sexual harassment. It is much too limiting; making the act only about sexual conduct. While this is undoubtedly a key part of the harm and discrimination women face, it does not explain the root of the issue.

³⁰ *Sex Discrimination Act 1984* (Cth), s 28A

³¹ Stop Gendered Violence at Work Report: Women's Rights at Work Report (2016) Victorian Trades Hall Council

³² *Ibid*, p 3

³³ *Ibid* p 2

“I’d started working at this company as the only female traffic control, and after my month of probation ... I turned up to work and he [my boss] pretty much told me to pack my stuff – I don’t fit into the male dynamic being the only girl, there’s no role for me there and he just doesn’t know how to deal with me. He said I should, instead of working, get a boyfriend who would look after me and to go back and work in nightclubs, which is what girl should do.”

- CFMMEU Member

The understanding of sexual harassment should be situated within a broader definition of gendered violence which allows regulators, unions and employers to address the behaviours, systems and structures that perpetuate gender inequality and create workplace environments with high risk of gendered violence. This would move our understanding so that it is more in line with leading international thinking.

Further, the legislative enforcement of the rights for women workers to be free from sexual harassment and gendered violence at work within the SDA is limited. Section 85 sets out that although the SDA deems sexual harassment an unlawful act, it is not an offence with any legal ramifications. VTHC seeks to change this, with recommendations and discussion on this subject below.

4. Gendered Violence is an Occupation Safety Hazard

Recommendation 2: A Work Health and Safety (WHS) style approach, including risk minimisation and obligations, must be taken to stop gendered violence

Gendered violence is a serious hazard and poses a significant risk to the health and safety of Australian workers. As outlined above, gendered violence causes physical and psychological injuries. It is a workplace hazard over which employers have a level of control. They are therefore duty holders and must by law take action to prevent injury by assessing and controlling the hazard and risk.

Safe Work Australia’s claims data demonstrates this point as it indicates that women suffer around 2.3 times more ‘mental disorder’ injuries than men (per million hours worked).³⁴ This data also shows that one in three of women’s mental disorder claims are attributed to some form of bullying or harassment, compared to only one in five men’s claims. These statistics indicate a gender difference in the experience of harassment at work and point to a prevalence of harmful gender-based violence.

Due to the nature of gendered violence and its pervasiveness in Australian workplaces, the risk of injury due to gendered violence can occur in any industry or workplace. Like all workplace hazards, in order to prevent injury duty-holders must assess and control the hazard and risks. Common sources of risk include but are not limited to:

Work environment:

- A workplace culture that tolerates or promotes sexist, homophobic and/or gender discriminatory attitudes and behaviours,
- Supporting, accepting or rewarding violent or aggressive behaviour,
- Facilities and equipment that don’t meet the needs of all staff including women and those who identify as LGBTIQ+,

³⁴ <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/945/work-related-mental-disorders-profile.pdf>

- Industries and occupations where women are over represented and more likely to be exposed to occupational and other forms of workplace violence such as health, aged care, disability, youth services, child care, education, law enforcement, retail and hospitality,
- Offensive material in the workplace. For example, pornography, and sexist or homophobic items including calendars, magazine, posters, clothing and novelty items,
- Service of alcohol such as licenced venues, pubs and restaurants, and formal or informal work functions where alcohol is served such as after work drinks and Christmas parties.

Systems of Work:

- Gender segregated workplaces where roles and positions are strongly aligned with dominant gender stereotypes or socially prescribed gender roles. For example, workplaces where all or most administration staff are women and all or most technical or operational staff are men,
- Management styles and behaviours that exclude and/ or disrespect some workers. For example, decision making or team building which takes place outside of formal work structures like at the pub or over lunch,
- Working in the community, home visits, outreach work,
- Working alone.

Workplace policies and procedures:

- A lack of mechanisms to address the gender pay gap and gendered segregation in terms of leadership and employment basis,
- Employers and workplace leaders are unable to adequately recognise and respond to incidents of gendered violence,
- Lack of appropriate reporting and investigation mechanisms for workers experiencing gendered violence,
- Employers and workplace leaders who fail to consult with workers and show little commitment to protecting the health and safety of all staff.

The approach to addressing gendered violence must recognise that it is a health and safety risk to women workers, LGBTIQ+ workers, and to workers who do not conform to dominant gender stereotypes or socially prescribed gender norms. It should take a WHS approach, and impose proactive obligations on employers to provide a safe workplace, free from gendered violence in line with the recommendations made in the ACTU submission to this Inquiry.

Recommendation 3: *The Sex Discrimination Act and Fair Work Act be amended to enforce a positive duty on employers to protect workers from gendered violence by implementing risk prevention action plans*

Currently the SDA does not establish any positive duty on employers to provide workers with a safe environment free from gendered violence. VTHC emphasises the points made by the ACTU; that the complaint process is individualised, it is inaccessible, isolating and costly for a worker who has experienced gendered violence.

Moreover, recognising that the root causes of gendered violence and sexual harassment are structural and driven by broad societal and workplace norms, a complaints system that is individualised means that it is not focused on identifying and implementing solutions that address the broader structural issues.

A woman worker experiencing gendered violence in her workplace is compelled to seek recourse from her employer before approaching the Human Rights Commission (HRC) where conciliation is the preferred method of reaching a solution. Where gendered violence may be in the form of, and

reinforced by workplace cultures, structures or common behaviours, holding a meeting with an employer may be unproductive at best and cause additional harm at worst. This is not an appropriate approach to a worker subjected to the type of psychological harm that gendered violence can cause.

Through our WRAW Chat process, women workers told us the pushback they received from their managers when they tried to stand up to bullying or harassment.

“I left my job because I felt there was offensive behaviour and management refused to address it when it was brought up”

- Anonymous

“I chose to leave my casual retail job because of bullying by a manager, which had been brought up multiple times through the company's recommended channels but barely addressed. I ended up with severe anxiety over the situation so decided I'd be better off unemployed.”

- Legal Transcript Coordinator

They also demonstrate how at-risk women workers feel, and how little this is a priority for their managers.

“In a previous workplace, a colleague (who was senior to me), regularly came to work affected by drugs or their come down. He would slam doors, shout and throw things. At that same workplace, he would make sexual comments to me that made me uncomfortable.”

- Anonymous

By the very nature of workplace systems, employers have more control over most aspects of work. When an employer is a perpetrator, or is ambivalent to a colleague or customer perpetrating gendered violence, it can leave women workers feeling powerless. It is important there is a positive duty on employers to address this power imbalance. This concept is also discussed below at (page 16) in regards to the complaints process.

VTHC contends that the best way to rectify a detrimental system that harms women workers is to shift the responsibility off them as individuals, and require employers to provide a safe and respectful workplace free from gendered violence.

VTHC recommends that the SDA and FWA align to bring a positive duty on employers, much like the Victorian WHS regulations. Specifically, to require employers to assess and control the risks associated with workplace gendered violence in order to prevent harm. Deterrent penalties should apply for employers breaching their duties.

Employers should be compelled to consider the risks of gendered violence and actively take actions to minimise or remove these risks. Changes to the legislation should require employers to consider such things as:

- Tasks likely to subject a worker to gendered violence,
- Structural or organisational power relations involved,
- The timing and frequency of these tasks,
- The consequences including physical or psychological injury,
- Integrating control measures into the way work is done,
- Ensuring all facilities and equipment meet the needs of all staff, including women and those who identify as LGBTIQ+ or who don't conform to general stereotypes,
- Removing and ensuring the workplace is free from offensive material such as pornography and sexist or homophobic material.

If there is a breach of these obligations, the onus should be on the employer to demonstrate they took all reasonable and appropriate steps to eliminate or control the risk of gendered violence.

Employers should be required to report annually to ensure all strategies are up to date and operating effectively.

Employers should also be required to report incidents of gendered violence, including outcomes of investigations annually. As part of this process employers should be required to create and promote to all employees procedures and policies outlining how to report gendered violence and how to appropriately respond to incidents of gendered violence. Employer response to incidents of gendered violence should include an investigation into all aspects of the incident including whether systems of work, structural or organisational power relations, or workplace culture are contributing factors.

Recommendation 4: Changes to the Fair Work Act and Sex Discrimination Act must give special consideration to the position of casual and precarious workers

Women make up the majority of workers in industries like hospitality, retail and care, which are all highly segregated along gendered lines.³⁵ These industries also have some of the highest rates of casualisation and insecurity. Recent surveys conducted by the relevant unions also demonstrate that workers in these industries face the highest risks of gendered violence. For example:

- Hospo Voice, United Voice's union for hospitality workers, found 89% of hospitality workers have been sexually harassed at work, and 19% sexually assaulted.³⁶
- The Shop, Distributive and Allied Employees Association, who represent retail and fast food workers found 85% of workers had experienced abuse from customers, including 12% who experienced abuse of a sexual nature.³⁷
- An Australian study found 88% of nurses working in psychiatric facilities (feminised workplaces) were subjected to physical or verbal assault,³⁸ and figures from WorkSafe Victoria show that up to 95% of Victorian healthcare workers have experienced verbal or physical assault.³⁹

Women overwhelmingly occupy part-time and casual jobs, and the rate of this type of employment has grown three times faster for women workers compared to men.⁴⁰ Given that women in Australia continue to bear responsibility for the majority of unpaid domestic and care work, a lack of meaningful flexible work arrangement for women with caring responsibilities forces many women into insecure and precarious work.

Women in insecure work do not receive the same paid entitlements as full-time works, and have no sick, personal or parental leave. They also miss out on regular superannuation benefits and opportunities for advancement. Over a lifetime, this perpetuates entrenched economic gender inequality.

³⁵ Workplace Gender Equality Agency (2018), Australia's Gender Equality Scorecard: Key findings from the Workplace Gender Equality Agency's 2017-18 Reporting Data

³⁶ <https://www.respectistherule.org.au/about>

³⁷ <https://www.sdaq.asn.au/news/no-one-deserves-a-serve-sda-launches-major-national-campaign-to-stop-abuse-of-retail-and-fast-food-workers-this-christmas/>; see also Good L, and Cooper R (2016) 'But It's Your Job To Be Friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector, *Gender, Work and Organization*, 23 (5), 447-469

³⁸ Delaney, J., Cleary, M., Jordan, R. & Horsfall, J. (2001). An Exploratory Investigation into the Nursing Management of Aggression in Acute Psychiatric Settings. *Journal of Psychiatric and Mental Health Nursing*, 8(1), 77-84.

³⁹ WorkSafe Victoria (2018), Introducing the occupational violence and aggression (OVA) incident investigation tool

⁴⁰ Workplace Gender Equality Agency, 2015. Australia's Gender Equity Scorecard: key findings from the Workplace Gender Equity Agency's 2014-15 reporting data 2015. WGEA. Sydney, p 3

As a result, women are experiencing harm. The Australian Institute of Health and Welfare reports that nearly two-thirds (65%) of primary carers aged 25-64 found it hard to meet living costs because of their caring role.⁴¹ Research also shows that casual loading is insufficient when it comes to making up for the loss of workplace entitlements that come with casual work.⁴²

A recent study demonstrated the impact this is having on their mental health. It showed 38% of all workers worry about their job, and 36% said their anxiety was because they work casually or temporarily.⁴³ Another study, focussing primarily on professionals, found that insecure workers were three times more likely than permanent employees to suffer in regards to their mental health.⁴⁴

Research relating to the health and safety of casual employees is lacking, but the Young Workers Centre (YWC) run from VTHC conducts research on the circumstances of young workers who are also overwhelmingly casually employed. They found 1 in 4 of young workers have had their OHS put at risk by their employer.⁴⁵

This type of work increases the risk of other forms of gendered violence and directly impacts a workers ability to report incidents.

Considering 60% of women workers feel unsafe or at risk at work,⁴⁶ and that women workers are highly casualised, it is clear that women employed in insecure work are at greater risk of breaches of their OHS including exposure to gendered violence.

Our WRAW Chat data demonstrates that casual and insecure women already feel powerless in the workplace.

“The managers are unprofessional and behave inappropriately. They watch us constantly on the security cameras which they are not meant to do.”

- Retail Worker

Complaints data from the HRC indicates only 11% of complainants were engaged in casual, contract or outwork,⁴⁷ while these workers make up a majority within feminised industries. This indicates that the complaint process in its current form is not accessible to the workers who need it most.

Workers employed casually or in insecure positions must be protected, as their jobs are put more at risk in the current system of reporting. It can be all too easy for employers to not renew shifts when a worker reporting gendered violence is seen to be ‘causing trouble’.

The Case Study also demonstrates how casual workers and workers employed through labour hire are less likely to feel secure enough to report issues. Changes to the FWA and SDA must give special consideration to insecure workers, and build in protections.

⁴¹ Australian Institute of Health and Welfare, *Australia's Welfare 2015*, (2015), <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129552261>>

⁴² SBS (2018) ‘Australia has the highest proportion of temporary labour in the OECD at one in four’, <<https://www.sbs.com.au/news/casual-workers-getting-ripped-off>>

⁴³ Fitzsimmons, C (2018) ‘An anxiety epidemic is gripping the world of work’, *The Sydney Morning Herald*, <<https://www.smh.com.au/business/workplace/an-anxiety-epidemic-is-gripping-the-world-of-work-20181113-p50frg.html>>

⁴⁴ Hall, E (2018) ‘Study Links Insecure Jobs with Depression an Anxiety’, *Australian Broadcasting Corporation*, <<http://www.abc.net.au/worldtoday/content/2003/s983530.htm>>

⁴⁵ Young Workers Centre Snapshot: Health and Safety (2017) Victorian Trades Hall Council

⁴⁶ Stop Gendered Violence at Work Report: Women's Rights at Work Report (2016) Victorian Trades Hall Council

⁴⁷ 2016-2017 Complaint Statistics, Australian Human Rights Commission

Recommendation 5: *Sex Discrimination Act and Fair Work Act provisions redefine ‘workplace’ so that provisions apply to the ‘world of work’*

The International Labor Organisation (ILO), last year, released *Report V(1): Ending Violence and Harassment in the World of Work*, pertaining to gendered violence within the world of work.⁴⁸ According to the ILO the term ‘world of work’ is critical to understanding the realities of workers who are subjected to gendered violence.

They quote a study by the United Kingdom’s Trade Union Congress (TUC), which states 14% of workers who reported harassment were subjected to it at a work-related event, such as at a Christmas party. It showed 1 in 20 women reported the incident occurred at another location of work, such as at a conference, and that 11% of young women workers were subjected to harassment on their way to and from work.⁴⁹ Women workers are at risk of gendered violence during all activities related to work.

The VTHC WRAW Chat process found that women workers are often placed in unsafe circumstances with colleagues outside of the traditional understanding of work.

“At a work drinks event the owner told me I had great tits and to take my top off when he was drunk. At another venue - an ex-partner that also worked at my workplace would constantly put me down and make me feel uncomfortable.”

- Anonymous

As such, VTHC recommends that the ILO’s definition of the world of work be included in SDA and FWA provisions pertaining to gendered violence. The world of work includes and extends to:

- The workplace,
- An occurrence arising not only “in the course of”, but also “arising out of work
- Where a worker is paid, taking a break, having a meal and in sanitary and washing facilities,
- Commuting to and from work
- Work related training, trips, events, social events and activities
- Through work-related communications enabled by information and communication technologies,
- In employer-provided accommodation,
- Workers in the gig economy, visa workers, and non-traditional forms of work.⁵⁰

VTHC recommends that the positive onus extended to employers expand to cover ‘the world of work’. There have been innumerable instances of working women reporting to unions their experiences of gendered violence from their fellow workers, clients or manager outside of the physical workplace.

5. Unionised Women Workers are Safer Workers

There is much evidence to suggest workers who are members of their union are safer than workers who are not.

⁴⁸ International Labour Conference, 108th Session, *Ending Violence and Harassment in the World of Work*, Report V(1) 2019

⁴⁹ Trade Union Congress (UK) 2016b. Still just a bit of banter? Sexual harassment in the workplace in 2016 (London) p 17-18

⁵⁰ International Labour Conference, 108th Session, *Ending Violence and Harassment in the World of Work*, Report V(1) 2019

The British Trade Union Council (TUC) collates a range of studies that finds there are lower injury rates in workplaces with trade union representation, fewer workplace fatalities and reduced ill-health.⁵¹

Unionised workers have elected health and safety representatives (HSRs), who work with their employers to ensure a risk-prevention approach to OHS hazards is taken, and have enforceable powers to take action if they feel safety obligations are being breached. Workers who understand gendered violence as a health and safety issue will be more likely to identify and report risks. Bringing gendered violence into the domain of the HSR in this way would increase the likelihood of immediate and appropriate response when incidents of gendered violence occurs at work.

Recommendation 6: Systems of Work, including for casualised and labour hire workers, must be made safe

Women workers, workers who identify as LGBTIQ+ and workers who do not confirm to dominant gender stereotypes or socially prescribed gender roles, are more likely to occupy less secure forms of employment and therefore need the support of their union. A number of components of the industrial landscape in Australia make it more difficult for workers to join and participate in unions and their activities.

Despite the evidence that unionised workplaces are safer than non-union sites, there are multiple barriers for casual workers to join a union. Union organisers frequently report that casual workers are more reluctant to join due to their high reliance on the good graces of their employer for shifts.

This must be reversed to effectively prevent and respond to issues of gendered violence at work.

However, unions continue to represent and deliver for casualised workers. One such example is the right to request permanency if they work the same hours over the course of a year.⁵² It is imperative that all protection for casual and other insecurely employed workers are explicitly written into any changes to the SDA and FWA when it comes to addressing gendered violence at work.

Recommendation 7: Strengthen Fair Work Act provisions pertaining to collective bargaining rights, and rights for organisers re discrimination

Since their inception, unions have fought for safe, secure and fair work and conditions. Unions also fight for the rights of women workers to have safe and secure jobs. One such recent example is union involvement in tackling the problem of pregnancy discrimination. The union movement, lead by the ACTU, has adopted strategies to address this form of discrimination. Unions lead the push for government inquiries and campaigned to change to the FWA. The legislation was amended to strengthen the obligation on employers to provide workers access to flexible working arrangements.⁵³

Another core focus has been full-time and regular employment, and employing the use of casuals only where it is absolutely necessary. Previous iterations of Australia's industrial laws protected these rights, but they are now slowly being chipped away with 40% of Australian workers being

⁵¹ Trade Union Congress (UK), 'The Union Effect', <<https://www.tuc.org.uk/research-analysis/reports/union-effect>>

⁵² Edwards, J (2017) 'Casual workers win right to request permanent employment after 12 months under Fair Work ruling', *Australian Broadcasting Corporation*, <<https://www.abc.net.au/news/2017-07-05/fair-work-decision-decision-on-full-time-employment-casuals/8680892>>

⁵³ Australian Council of Trade Unions (2013) 'Workers urged to speak up as pregnancy discrimination overtakes disability for the top complaint in workplaces' <<https://www.actu.org.au/actu-media/archives/2013/workers-urged-to-speak-up-as-pregnancy-discrimination-overtakes-disability-for-the-top-complaint-in-workplaces>>

employed on a casual or insecure basis.⁵⁴ Feminised industries are most affected by this, as they have the highest rates of casualisation and insecurity (as explained above at page 14).

Casual workers are highly dependent on their employer for their income, which it weakens their propensity to join trade unions and speak out against inequality and injustices in the workplace. This issue acutely affects women workers.

The right to take industrial action is highly restricted under the FWA. In comparison to jurisdictions like the UK and US, Australia's right to strike laws impose onerous restrictions, as industrial action may only be taken during a defined period of enterprise bargaining. It excludes the ability to take industrial action over OHS breaches such as gendered violence, unfair dismissals, political strikes, or pattern bargaining; something that has drawn constant criticism from the ILO.⁵⁵ The case study shows the few industrial options that were available for workers to stand with the Complainant and fight for their right to be free of gendered violence, and ultimately the workers in that workplace took action through petition.

Even in workplaces that do have union representation, the rights for union organisers to enter worksites to assist their members is limited. Organisers must first apply to the Fair Work Commission to gain an entry permit.⁵⁶ They can only exercise right of entry in certain circumstances, one such example being where there has been a breach of the FWA. They cannot enter in situations that could lead to a breach. Further, these union organisers only have rights of entry under situations arising to claims under the FWA, and not the SDA. Therefore, it is much more difficult for union organisers to assist workers at their workplaces where they have been subjected to gender-based discrimination. These onerous restrictions make workplaces more unsafe and exacerbate issues of gendered violence in the workplace.

To fully protect workers from gendered violence, any rights arising must be enforceable and protected by unions. Workers must be able to form unions and fully exercise union rights.

VTHC recommends changing the legal framework of both the SDA and the FWA to increase rights to workers in union, including expanding right of entry for union organisers and the right to take industrial action. Measures to limit the rampant casualisation of the workforce and to enforce rights arising under various legislative instruments including the SDA and not just limited to the FWA needs to be implemented.

Recommendation 8: Introduce a mechanism for a collective claim into the Sex Discrimination Act

Currently, lodgement of a 'representative complaint' under the SDA is limited. A trade union or representative body may do so if certain conditions are met, but cannot commence legal proceedings on behalf of an aggrieved person or group.⁵⁷ This means that where there is an act of gendered violence perpetrated concurrently against a whole group of workers or people, they all have to claim separately.

VTHC recommends that the SDA be amended to give the power to unions and other groups to bring proceedings collectively as part of a claim of gendered violence. The rights here should enable a group of workers to bring the same claim against their employer, in a similar way to group proceedings or class actions.

⁵⁴ Australian Council of Trade Unions (ACTU), (2018) 'Australia's insecure work crisis: Fixing it for the future'

⁵⁵ Long, S (2017) 'Have Australia's right to strike laws gone too far?' *Australian Broadcasting Corporation* <<https://www.abc.net.au/news/2017-03-21/have-the-right-to-strike-laws-gone-too-far/8370980>>

⁵⁶ *Fair Work Act 2009* (Cth) s 512

⁵⁷ *Australian Human Rights Commission Act 1986* (Cth)

6. Protecting Vulnerable Workers Requires a Well-Resourced Regulator

Recommendation 9: The Human Rights Commission needs the powers and resources to be an effective regulator

The success of measures to address gendered violence and sexual harassment depend of how effectively they are monitored and enforced. The HRC should be given the powers of an independent third party with investigative powers and the power to compel organisations and employers to comply with directives. Workers should be able to report breaches of employer duties to provide workplaces free of gendered violence as far as reasonably practicable.

While the Commission has statutory powers to investigate, these are limited to compelling evidence be produced for conciliations.⁵⁸ This is one of the few breaches in the SDA that currently bares penalties. These powers must be extended to investigate and enforce breaches of duties pertaining to gendered violence.

The challenges that face Australia when it comes to human rights breaches are large and growing. Gender inequality is an acute, immediate problem where, as a prosperous nation, our lack of progress is shameful. VTHC notes with immense frustration, that within this context Federal funding of the HRC been cut by \$20.3 million over five years.⁵⁹ To achieve any real change on issues facing working women, workers who identify as LGBTIQ+ and those who do not conform to dominant gender stereotypes or socially prescribed gender roles, not only must funding for the Commission be restored, it must also be bolstered.

VTHC recommends that the Federal Government reinstates this funding, and ensure the Commission has the resources and powers it needs to effectively prevent and respond to gendered violence.

Recommendation 10: Introduce standards, procedures and frameworks into the conciliation process to protect women workers

Currently, the main role of the HRC in resolving instances of sexual harassment is through conciliation; an informal and flexible approach.⁶⁰ Before this can occur, women workers must first raise a complaint through the formal processes in their workplace.

Our WRAW Chat data demonstrates that these workplace processes are often unclear, lengthy, and cause further harm to workers.

“A colleague made ugly comments about indigenous people, Muslims and Sex Workers. When I expressed that I was offended, my Team Leader called a meeting with me to discuss my attitude.”

- Anonymous

“I have had my manager wolf whistle at another woman worker, and when I said that is not okay to do at work the manager asked me if I was jealous. I raised this harassment with my manager's boss and he said the issue was a personality clash.”

- Copywriter & Editor, Melbourne

⁵⁸ *Sex Discrimination Act 1984* (Cth) s 87

⁵⁹ Australian Human Rights Commission Annual Report 2017-2018, p 47

⁶⁰ Australian Human Rights Commission 'Conciliation - How it Works'

<<https://www.humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works>>

“Having begun work in 1982 I have experienced sexual harassment, groping, lewd comments and structural discrimination throughout a good deal of my working life. I left my previous career in the printing industry and returned to study largely because I was so tired of this kind of pressure in the workplace. Ultimately I underwent treatment for PTSD due to the impact of these experiences.”

- Postdoctoral Research Fellow, Moonee Ponds

Gendered violence is damaging to the health and wellbeing of women workers. VTHC argues that placing a worker in a position where the onus falls on her as an individual compounds the existing harm and that an apology is a manifestly insufficient recourse.

The conciliation process is not public, nor subject to evidentiary standards. Both parties must agree on the outcome. The Commission website outlines that an outcome may be an apology, reinstatement of job, compensation for lost wages, changes to a workplace policy.⁶¹

We contend in its current form, it is an inappropriate mechanism that fails to take account of power imbalances. It also cannot deal with the systemic and ingrained cultural issues that underpin gender-based violence. Union organisers have reported that it's common for victims of gendered violence to see no material change after conciliations. In extreme cases it's made it worse, for example being made to work in proximity with the perpetrator or being moved away to another work site or department.

Further, the six-month time limit for filing a complaint under the Australian Human Rights Commission Act is too restrictive.⁶² It can take time to come to terms with the experience of gendered violence and then to seek recourse. This is why remedies arising under the FWA, other than unfair dismissal, have a time limit of six years.⁶³ Claims relating to gendered violence should be brought into line with FWA provisions.

VTHC recommends a more formal process be adopted for conciliations that prioritise a process for protecting women workers and addressing unsafe systems of work. Employers should be required to prove they have met their obligations to prevent gendered violence under a WHS framework.

Recommendation 11: Expand workers compensation so that it is more accessible to and meets the needs of workers who have been subjected to gendered violence

As gendered violence is a WHS issue, damages need to be brought into line with a workplace health and safety framework, with a focus on workers' compensation. As gendered violence is an issue of workplace health and safety, workers who are subjected to any derogations or harm should be entitled to the same compensation schemes that are available to workers who suffer any other injury under WHS.

Workers compensation schemes impose requirements which are too onerous to meet for workers who are subjected to gendered violence. Psychological injuries are defined differently under each scheme, and depends on the way it defines an eligible worker, and their connection to the harm. Successful claims for psychological injury due to sexual harassment understate the size of the problem and mean employers have no financial incentive to provide a workplace free of harm. These schemes should be amended so that workers who have been subjected to gendered violence can more readily compensation for their injury. In addition, current workers' compensation schemes need to be required to have specialist gendered violence capacity to process claims and deliver support to injured workers.

⁶¹ Ibid

⁶² *Australian Human Rights Commission Act 1986* (Cth)

⁶³ *Fair Work Act 2009* (Cth) s 544

7. Conclusion

Sexual Harassment in the workplace is a form of gendered violence. Gendered violence is underpinned by and driven by cultures of inequality. This is compounded by the reality that women are often placed in more vulnerable positions within the workforce, particularly through insecure employment.

VTHC recommends that the HRC consider the issue of sexual harassment as part of a broader understanding of gendered violence.

Historically, rights and protections around sexual harassment have been framed around an individualistic approach. The issues are dealt with on the basis that 'one bad apple' has behaved badly towards another worker and within a framework of agreed outcomes.

This approach has been proven manifestly inadequate. It has made it difficult to achieve positive outcomes for workers and virtually impossible to force the structural and systemic workplace changes that can prevent further harm.

A work health and safety approach should be adopted in order to effectively prevent and respond to gendered violence. It is clear that employer's obligation to provide a safe and respectful workplace should extend to include an obligation to proactively take steps to ensure a workplace which is free from the risk of gendered violence.

To do so, the SDA and the FWA must be amended to give specific rights and powers to workers and unions to collectively stand up for their rights when it comes to gendered violence. And it requires the Commission to have investigative and enforceable powers of an independent regulator for any workers who fall through the cracks.

The responsibility of overcoming the root cause of sexual harassment and other forms of gendered violence and gender inequality cannot continue to be placed on women individually. It is time for this to change. VTHC calls on employers, regulators, and government to take meaningful, practical action to prevent and effectively respond to gendered violence at work.

8. Recommendations

Recommendation 1 Change the definition of Sexual Harassment to Gendered Violence

Recommendation 2: A Work Health and Safety (WHS) approach, including risk minimisation and obligations, must be taken to stop gendered violence

Recommendation 3: The Sex Discrimination Act and Fair Work Act be amended to enforce a positive duty on employers to protect workers from gendered violence by implementing risk prevention action plans

Recommendation 4: Changes to the Fair Work Act and Sex Discrimination Act must give special consideration to the position of casual and precarious workers

Recommendation 5: Sex Discrimination Act and Fair Work Act provisions redefine 'workplace' so that provisions apply to the 'world of work'

Recommendation 6: Systems of Work, including for casualised and labour hire workers, must be made safe

Recommendation 7: Strengthen Fair Work Act provisions pertaining to collective bargaining rights, and rights for organisers re discrimination

Recommendation 8: Introduce a mechanism for a collective claim into the Sex Discrimination Act

Recommendation 9: The Human Rights Commission needs the powers and the funding to be an effective regulator

Recommendation 10: Introduce standards, procedures and frameworks into the conciliation process to protect women workers

Recommendation 11: Expand workers compensation so that it is more accessible to and meets the needs of workers who have been subjected to gendered violence

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