

ACTU ANSWERS TO QUESTIONS ON NOTICE

Question 1

CHAIR: I would like to give the ACTU an opportunity to respond to some of the claims that have been made in other submissions. Some of the submissions came through quite late, so I appreciate you probably haven't had a chance to go through them all. But it's around this issue of representation and having the capacity for unions to represent victims.

One of the submissions we received claimed that unscrupulous parties might be able to weaponise claims against employers in a manner that is entirely at odds with wronged individuals. That was in the MTO's submission. In questioning, the Minerals Council Australia used the word 'coercion' in relation to the way victims might be treated by particular representatives. I personally find those claims without too much evidence, but I thought I'd give you an opportunity to respond. I think it's hard for people to understand how difficult it is to access justice in these types of claims and how important it is for victims to be represented by industrial officers who, let's be honest, come at a far less cost than expensive lawyers and how these provisions around representation will assist victims in having a chance to have their matters heard.

In addition to the response provided to the Committee on 17 October 2022, the ACTU provides the following further response.

Unions represent their members in relation to a wide range of employment related issues every day, including discrimination and sexual harassment matters. Unions already have the ability to bring representative complaints to the Australian Human Rights Commission (**the Commission**). What the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (**the Bill**) does is fix a gap in the law that did not previously allow those representative claims to continue through to a court should the matter not resolve at Conciliation.

Giving workers, and their unions, the ability to bring these claims is crucial. The existing class action provisions are highly technical with very specific requirements and are not suited to matters of this kind (for example, they require a minimum group of seven workers. Sexual harassment should not have to affect seven workers for a representative claim to be made). Currently, if there is more than one worker in a workplace affected by sexual harassment, and they want to pursue their complaints in court, they have to bring individual claims – meaning there is no ability to deal with the systemic issue. Not only is this an inefficient and impractical use of court resources, it also has the effect of discouraging many workers from seeking redress, due to the multiple barriers that exist to individuals bringing complaints – including not knowing where to go for help, fear of negative consequences, the cost and resources involved, risk of retraumatisation, and complaints processes being inadequate and inaccessible. This means that despite a third of workers experiencing sexual harassment, only 17% make a complaint.

Individual court actions are lengthy, costly, risky and distressing for many applicants. The ability to bring a claim as part of a group provides much needed 'safety in numbers' and also allows a systemic issue to be effectively addressed. Being a part of a bigger group makes it far less likely a worker will lose their job or suffer victimisation or adverse consequences at work as a result of making a complaint. Allowing unions to bring these claims on behalf of their members also provides workers with access to justice that they would be unlikely to be able to afford otherwise, given the low cost of union membership fees compared to the fees charged by private law firms and others.

Given how difficult it is for applicants to access justice in these types of claim, and the number of barriers that exist, providing access to representative claims is a crucial measure which will enable many workers to have a chance to have their complaints heard and addressed.

Unions are experts in representing their members, including bringing claims on their behalf, and are well versed and trained in the complex and nuanced considerations that accompany the bringing of both individual and collective claims, including the need to be highly responsive to individual circumstances and members who are distressed or have experienced trauma. Unions have to act in the best interests of their members when bringing claims, including only bringing claims that their members genuinely want to pursue. The idea that unions would coerce vulnerable and distressed members to bring claims that were not in their interests to bring has no bearing on the reality of how unions represent their members.

The concerns raised have no basis in any evidence and are completely unsubstantiated. We would respectfully suggest they come from a lack of knowledge about what is involved in representing victim-survivors, the barriers to accessing justice, and how unions provide representation to their members. They may also be grounded in more ideological objections to the core role that unions play in representing their members in the workplace every day. These concerns should therefore not be given any weight by the Committee.

Question 2

Senator BARBARA POCKOCK: My second and last question goes to the question of resources. You made the point also that there was an important issue around resourcing the Human Rights Commission. I'd like to hear a little more, specifically about what you think is needed there. The *Respect@Work* report also pointed to the need for resources for unions, in terms of meeting what we hope will be an increasing number of people bringing forward complaints where they believe they've been harassed. There are also quite strong recommendations in the report in relation to working women's centres—that they should be community based, they should offer a holistic model of care, they should be provided across the country and in an independent, community based structure. I want to hear your response on resourcing for the Human Rights Commission, unions and community based working women's centres.

In addition to the response provided to the Committee on 17 October 2022, the ACTU provides the following further response.

Resources for the Commission and unions

The Australian Human Rights Commission (**the Commission**) needs appropriate funding and resources to ensure that it is able to perform all its functions, including the new enforcement and compliance functions conferred on it by the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (**the Bill**). The Commission was subject to significant budget cuts under the previous government and in March 2022 the Commission itself warned that its current funding did not provide it with the resources required to perform its existing statutory functions. The ACTU understands that there are currently significant wait times of up to 6 months for a complaint to be investigated. This is woefully inadequate and will result in many workers giving up on pursuing their complaints or not making them at all. It is crucial that the Commission has appropriate resources to effectively pursue both its existing functions as well as its new enforcement functions, to give the new legislative provisions full effect and meaning.

The Commission, unions and industry should also be given appropriate funding and resources to support an effective roll out of the new laws, for example by being involved in consultation and development of industry specific guidance, and delivering training and education for workers and employers regarding the new laws.

Given the gravity and scale of sexual harassment at work in Australia, and the finite resources of the Commission, unions and workers should also have the ability to make complaints and bring claims regarding non-compliance with the positive duty, and to enforce compliance notices in the courts.

Currently, all of the enforcement options for the positive duty lie with the Commission. There is no ability for workers or trade unions to make a complaint or bring claims regarding non-compliance with the positive duty, and they cannot independently enforce compliance notices in the courts. Allowing them to do so would effectively share the burden of compliance with the Commission, improve enforcement by allowing actors other than the Commission to enforce the law, and will help to drive systemic change. Even with significantly improved funding and resources, the pervasive nature and prevalence of sexual harassment in all industries is beyond the ability of one small regulator to address. Without the ability for workers and unions to bring claims regarding a breach of the positive duty, and enforce compliance notices, there will be countless missed opportunities for enforcement, development of jurisprudence and case law, and consequent systemic change. Allowing actors other than the Commission to enforce the law will greatly improve compliance especially in small-medium workplaces which may not be priorities for the Commission to investigate. This would address common issues that other regulators face, including the Fair Work Ombudsman, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and WHS regulators.

Resources for Working Women's Centres

The ACTU fully supports Recommendation 49 of the Respect@Work Report which provided for increased and recurrent funding to Working Women's Centres (**WWC's**), and the establishment of WWC's in jurisdictions where they do not currently exist. We welcome this week's budget allocation of \$32 million to implement this recommendation.

Federal, State and Territory Governments should coordinate to ensure ongoing, secure and adequate funding for the WWC in each State and Territory.