Speaking Notes
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By Video Conference
Senate Standing Committee on Human Rights
Re: Bill C-65, An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1
June 13, 2013

Honourable Senators, good afternoon. Thank you for inviting me to appear before you today to share with you my thoughts on some of the proposed amendments in Bill C-65. I will focus my comments on the subject of workplace sexual harassment.

First, allow me to tell you a little bit about myself. I am a labour, employment and human rights lawyer, practicing at Pink Larkin in Halifax. I conduct independent workplace investigations, focusing on complaints of workplace sexual harassment. I provide training to human resources professionals on how to conduct proper workplace investigations.

Based on my view of investigation best practices, I would like to offer my thoughts on three aspects of Bill C-65 as they relate to workplace sexual harassment:

1. The definition of harassment in s.0.1
2. The making of a complaint to the employee's supervisor or designate in s.5(1)
3. The lack of detail concerning the investigation of complaints.

1. The Definition of Harassment in s.0.1

I have two comments to make regarding the definition of harassment in s.0.1:

(a) it contains a potential ambiguity that could give rise to unnecessary confusion and litigation

(b) it should, in my view, contain a separate definition of sexual harassment

Workplace investigators, employment and labour lawyers and human resources professionals work with a fairly standard definition of sexual harassment. There is a large body of case law that provides a great deal of certainty about how sexual harassment is to be defined and interpreted. In my view, Bill C-65 should reflect that standard definition in order to enhance certainty and reduce any potential confusion about the definition of sexual harassment under the *Code*.

(a) Potential Ambiguity

Section 0.1 of Bill C-65 reads as follows:

> ***harassment and violence*** means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation ***or other physical or psychological injury or illness*** to an employee, including any prescribed action, conduct or comment;

The phrase "or other physical or psychological injury or illness" suggests that the words preceding the phrase, i.e. "offence" and "humiliation," must amount to some kind of physical or psychological injury or illness. I do not believe that the intention was to narrowly define what kind of conduct could constitute harassment and violence, including sexual harassment and violence. Such a narrow definition would not be consistent with best practices.

My recommendation is, at the very least, to remove the word "other" so that the definition reads:

> ***harassment and violence*** means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation ***or physical or psychological injury or illness*** to an employee, including any prescribed action, conduct or comment;

(b) separate definition of sexual harassment

In fact, I believe that the definition should be replaced with separate definitions for "harassment," "sexual harassment" and "workplace violence" that accord with best practices and that enhance certainty about what behaviour the *Code* governs. A complete replacement of the current definition would also resolve the problematic ambiguity.

I believe that the Ontario *Occupational Health and Safety Act*, which contains separate definitions for "workplace harassment, "workplace sexual harassment," and "workplace violence," accords with best practices and can be applied with ease and certainty by employers and investigators. Those definitions read as follows:

"workplace harassment" means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or

(b) workplace sexual harassment;

"workplace sexual harassment" means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome;

"workplace violence" means,

(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,

(b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,

(c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

My recommendation is that s.0.1 of Bill C-65 be replaced with the above separate definitions for "harassment," "sexual harassment" and "violence."

2. The making of a complaint to the employee's supervisor or designate in s.5(1)

As we have seen with recent high-profile public disclosures of sexual misconduct, women have waited years, sometimes decades, to come forward with allegations of sexual misconduct by their employer or superior because they feared retaliation and did not trust the internal complaint mechanism. The proposed amendments in C-65 do not, in my view, adequately address this significant barrier and power imbalance facing victims of workplace sexual harassment.

Section 5(1) of Bill C-65 would replace s.127.1(1) and (2) of the *Code* with the following language, which provides that an employee may make a complaint about harassment or violence to his or her supervisor or to the person designated in the employer's policy:

> **127.1(1)** An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident, injury or illness arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128,129 and 132, make a complaint to the employee's supervisor.
>
> **(1.1)** However, in the case of a complaint relating to an occurrence of harassment and violence, the employee may make the complaint to the employee's supervisor or to the person designated in the employer's work place harassment and violence prevention policy.

The Ontario *Occupational Health and Safety Act* deals with complaints of misconduct by employers or supervisors in s.32.0.6(2)(b) by requiring employers to include measures and procedures in their policies for workers to report harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser:

> **32.0.6** (1) An employer shall, in consultation with the committee or a health and safety representative, if any, develop and maintain a written program to implement the policy with respect to workplace harassment required under clause 32.0.1(1)(b).
>
> (2) Without limiting the generality of subsection (1), the program shall,
>
> (a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;
>
> (b) include measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser;
>
> …

I recommend adding a further subsection to s.127.1(1.1) to require an employer to have measures and procedures for an employee to make a complaint to a person other than the employer or supervisor, where the employer or supervisor is the alleged perpetrator:

> **127(1.1) (a)** However, in the case of a complaint relating to an occurrence of harassment and violence, the employee may make the complaint to the employee's supervisor or to the person designated in the employer's work place harassment and violence prevention policy.
>
> **(b)** ***The employer's workplace harassment and violence prevention policy must include measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser.***

3. The lack of detail concerning the investigation of complaints.

In my view, one of the most important tools to address workplace sexual misconduct and to address the power imbalances and fear that often prevent women from coming forward is to provide them with access to competent, fair, prompt and unbiased investigations.

The Ontario *Occupational Health and Safety Act* requires employers to conduct investigations into complaints of harassment that are "appropriate in the circumstances":

> **32.0.7** (1) To protect a worker from workplace harassment, an employer shall ensure that,
>
> (a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;
>
> …

The Ontario legislation also provides an inspector with the power to order the employer to cause an investigation to be conducted, at the employer's expense, "by an impartial person possessing such knowledge, experience or qualifications as are specified by the inspector":

> **55.3** (1) An inspector may in writing order an employer to cause an investigation described in clause 32.0.7 (1) (a) to be conducted, at the expense of the employer, by an impartial person possessing such knowledge, experience or qualifications as are specified by the inspector and to obtain, at the expense of the employer, a written report by that person.

Section 20.9(1) of the *Canada Occupational Health and Safety Regulations* currently require an employer to appoint a competent person to investigate workplace violence when the matter cannot be resolved with the employee, and define "competent person" as a person who is (a) impartial and is seen by the

parties to be impartial; (b) has knowledge, training and experience in issues relating to workplace violence; and (c) has knowledge of relevant legislation.

I recommend that a further subsection be added to s.127.1(2) of the *Code* to require the employer, if the complaint cannot be resolved, to have an investigation conducted by a competent person:

> 127.1(2) (a) The employee and the supervisor or designated person, as the case may be, shall try to resolve the complaint between themselves as soon as possible.
>
> ***(b) If the employee and the supervisor or designated person, as the case may be, fail to resolve the complaint between themselves, the employer shall appoint a competent person to investigate the complaint.***

I also recommend that s.5(4) of Bill C-65 grant the Minister the power to order an employer to appoint a competent person to conduct an investigation in a new subsection of s.127.1(9) of the *Code*:

> ***127.1(9.3) The Minister may in writing order an employer to appoint a competent person to investigate the complaint.***

I recommend that competent person be defined either in the body of the *Code* or in the regulations to be a person who is (a) impartial and is seen by the parties to be impartial; (b) has knowledge, training and experience in issues relating to workplace harassment, sexual harassment, or violence, as the case may be; and (c) has knowledge of relevant legislation.

Thank you again for the opportunity to appear before you today, and I hope that my comments will be of assistance to you.