Victorian inquiry into the labour hire industry and insecure work

Submission to the Department of Economic Development, Jobs, Transport and Resources

11 December 2015

# About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and designated mental health services as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service. We also deliver non-legal advocacy services to people receiving compulsory treatment under the *Mental Health Act 2010* (Vic).

## Our specialist practice expertise

Our dedicated Equality Law Program provides advice and representation to people experiencing discrimination, harassment and victimisation in all areas, including employment. We assist people with complaints in various jurisdictions, using state and federal anti-discrimination legislation, including the *Fair Work Act 2009* (Cth) and the *Equal Opportunity Act 2010* (Vic). The services provided by the Equality Law Program include phone advice, duty lawyer services, weekly clinic advice sessions and ongoing case work and representation. In 2014-15 VLA provided legal advice in approximately 1,522 discrimination matters and our Legal Help telephone service responded to approximately 4,507 discrimination and employment related queries.

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# Executive summary

We welcome the opportunity to contribute to the Victorian Government’s inquiry into the labour hire industry and insecure work (Inquiry). Our dedicated Equality Law program provides advice and representation to people who experience discrimination at work, including migrant workers.

This submission addresses the following questions contained in the background paper:

* 1. *Is there evidence of labour hire being used to evade workplace laws and other legal obligations?*
  2. *What experience or evidence can you provide of exploitation of vulnerable workers in Victoria? This could include working visa holders, young or older workers, workers from a non-English speaking background, women workers, workers with low levels of formal education, workers with a disability or other vulnerable workers.*
  3. *What regulatory options are available to address the issues raised by the Terms of Reference, within the limits of Victoria’s legislative powers? What models could operate for a national approach to regulation of the labour hire industry?*

Our clients report examples of labour hire arrangements being used by employers to evade workplace laws and other legal obligations. Low paid workers subject to labour hire arrangements and other forms of insecure employment have limited bargaining power, making them particularly vulnerable to exploitation. This risk is heightened for women workers, migrant workers, workers with disability and victims of family violence.

# Summary of recommendations

**Recommendation 1**: Increase education for both employers and workers about their employment rights and obligations.

**Recommendation 2**: Introduce an amnesty for migrant workers who complain about workplace exploitation in respect of any alleged breach of their visa conditions.

**Recommendation 3:** Insert a provision in the EO Act, similar to section 20, explicitly requiring a principal to make reasonable adjustments for contract workers with a disability.

**Recommendation 4:** Insert provisions in the EO Act requiring all duty holders to make reasonable adjustments for pregnant women.

**Recommendation 5:** Include “experiencing family violence or stalking” as a protected attribute in section 6 of the EO Act.

**Recommendation 6:** Re-enact Part 9 of the EO Act as it was at 28/04/2010 to empower the Victorian Equal Opportunity and Human Rights Commission to more freely investigate breaches of the EO Act; issue enforceable undertakings and improvement notices; and apply to VCAT to enforce compliance with those undertakings and notices.

# Labour hire

Our clients report examples of labour hire arrangements being used by employers to evade workplace laws and other legal obligations. For example, our clients report instances of requesting sick leave, questioning their entitlements or making a complaint and then being told that they are no longer required by the host company, without being provided with any reason. While the labour hire agency may know the true reason, it has a stronger commercial interest in maintaining good relations with the host company than with the individual worker. This leaves the worker, who is often unskilled and has limited employment options, in a particularly vulnerable position.

The current approach to responding to complaints of discrimination or unfair treatment in labour hire arrangements is to endeavour to determine which one of the labour agency and the host is the true “employer”, in order to assess liability. In our experience, the host company is usually found not to be the “employer”, with liability resting with the labour hire agency. This enables the host to effectively circumvent labour regulation in certain circumstances, despite enjoying the benefits of acting as an employer.[[1]](#footnote-1)

**Angelo’s experience**

Angelo arrived in Australia more than 10 years ago. He was employed by a labour hire agency and was sent to work exclusively for one company as a labourer.

He worked at that company for several years and in that time was subjected to frequent racial discrimination by other workers. The workers mimicked his accent and made derogatory comments towards him.  The workers who treated Angelo badly were all employed directly by the company. Angelo complained on multiple occasions but nothing was done.  After the final complaint, Angelo was told by the labour hire agency that he was no longer required at the company. Angelo had not had any performance complaints.

He remained on the books at the labour hire agency, however he was not offered any other regular work. He developed depression and felt very unwell as a result of the treatment, and the termination of his placement.

# Exploitation of vulnerable workers

Low paid workers in other forms of insecure employment, including contracting arrangements, have limited bargaining power, making them particularly vulnerable to exploitation. This risk is heightened for women workers, migrant workers, workers with disability and victims of family violence.

The *Equal Opportunity Act 2010* (Vic) (EO Act), prohibits discrimination from both employers against employees (s 18) and principals against contract workers (s 21). The EO Act also provides that both employers and principals must not unreasonably refuse to accommodate the family responsibilities of employees and contract workers (ss 19 and 22). However it is unclear under the EO Act whether an employer’s obligation to make reasonable adjustments for an employee or prospective employee with a disability (s 20), also extends to principals and contract workers.

*Migrant workers*

In our experience migrant workers are particularly vulnerable to exploitation because of their reluctance to complain for fear of deportation, the lack of alternative employment options, and unfamiliarity with workplace laws and entitlements. Labour hire and other forms of insecure work arrangements, including contracting arrangements, heighten this risk. Failing to provide any meaningful legal protection to these workers increases their vulnerability to unlawful actions by employers. The stories below provide examples of the added barriers faced by migrant workers seeking to exercise their rights.

**Antonio**

**“**I worked in retail for one and a half years. The shop sponsored me on a working visa. If I remained working there I would have been eligible to apply for permanent residency.

I was fired after taking sick leave. I had medical certificates for the leave but the manager still fired me when I returned to work. They said that the reason was that the shop wasn’t making money and they wanted to replace me with someone more junior. However, I spoke to another senior employee, who told me I was unreliable because of my medical condition.

I considered making a complaint of discrimination, but decided against it because I needed a reference from my boss in order to apply for a new visa and get another job.**”**

**Hicham’s experience**

Hicham was employed by a cleaning company to work as a cleaner in a restaurant chain. He is a refugee and spent several years in detention before being granted protection. He has depression, for which he is medicated. During his year and a half long stint at the restaurant, he was subjected to repeated derogatory remarks about his racial background and mental illness from staff, which he found deeply distressing. Hicham complained to his employer and a meeting was held between his employer and the restaurant. Undertakings were made by the restaurant to prevent further abuse, however it continued unchecked. Hicham also asked for a transfer to another site where his employer provided cleaning, but was refused. Despite Hicham’s complaints, and his employer’s seeming sympathy, nothing changed at work.

On one occasion the restaurant employee (John) who had subjected Hicham to the worst treatment, slapped him as they passed each other in a corridor. Hicham pushed John and told him not to touch him. The restaurant took CCTV footage of the incident to Hicham’s agency employer and claimed he had assaulted John. His employer met with Hicham and asked him what happened. Hicham stated what occurred, and also referred management to his previous complaints about John’s conduct. Hicham was dismissed.

**Recommendation 1**: Increase education for employers and workers about their employment rights and obligations.

**Recommendation 2**: Introduce an amnesty for migrant workers who complain about workplace exploitation in respect of any alleged breach of their visa conditions.

*Workers with disability*

Section 20 of the EO Act requires employers to make “reasonable adjustments” for employees with a disability. However it is unclear whether this requirement to make “reasonable adjustments” also extends to principals for contract workers with a disability. Contract workers are defined in the EO Act as those who work for a principal under a contract between the worker’s employer and the principal. This could include labour hire workers who work for a host organisation under a labour hire arrangement.

Amending the EO Act would ensure that the same legal standard to make reasonable adjustments is applied to both employers and principals. This is appropriate to prevent companies from outsourcing their employment obligations through a labour hire arrangement. It would also provide much needed protection to labour hire workers experiencing discrimination by their host organisation, as indicated by Alec’s story below.

**Alec’s experience**

Alec worked at a plant for four years under a labour hire arrangement. Alec sustained an injury at work and needed a month of personal leave to recover from his injury. When he returned to work he provided his host organisation with a medical certificate and said that he required modified duties for a further four weeks. The host organisation sent him home and said that there was no more work for him. His employer - the labour hire company - later said that things were quiet and that there were no other roles for him.

**Recommendation 3:** Insert a provision in the EO Act, similar to section 20, explicitly requiring a principal to make reasonable adjustments for contract workers with a disability.

*Women workers*

There is no explicit obligation for duty holders to make reasonable adjustments for pregnant women. Pregnant workers may require some adjustments to their working conditions or arrangements because of the physical symptoms of pregnancy. For example a woman may need to take more regular bathroom breaks, to sit rather than stand, or to avoid heavy lifting incidental to her role during her pregnancy. While the EO Act requires employers to accommodate the responsibilities of parents and carers, there is currently no positive obligation on employers to make reasonable adjustments for a woman during her pregnancy.

While the FW Act provides for transfer to a safe job or paid “no safe job leave” if the employee is fit to work but unable to perform her role for health and safety reasons, this solution is generally too extreme. More commonly, there will simply be some minor aspects of the employee’s role that requires adjustment, or the employee requires flexibility to accommodate her morning sickness.

***Bevilacqua v Telco Business Solutions (Watergardens) PL* (Human Rights) [2015] VCAT 269**

Ms Bevilacqua’s morning sickness caused her to vomit frequently and suffer dizziness, feel faint, experience hot flushes and back, leg and lower stomach pain. She needed to frequently run to the toilet to vomit and to sit down to rest. Her symptoms would often last all day.

She claimed that her employer refused to make reasonable adjustments for these symptoms, such as allowing her to sit down or take more frequent toilet breaks or reduce her hours, among other things.

Her claims of direct and indirect discrimination were complicated. Her claim was perhaps most easily characterised as a failure to make reasonable adjustments. She therefore argued that her morning sickness was a disability, and that her employer failed to make reasonable adjustments for her disability, even though morning sickness is a normal symptom of pregnancy.

VCAT held that while “[i]n ordinary life a pregnant woman suffering morning sickness is not considered to be a person with a disability”, for the purpose of the EO Act, morning sickness is a disability.

**Recommendation 4:** Insert provisions in the EO Act requiring all duty holders to make reasonable adjustments for pregnant women.

*Victims of family violence*

We have spoken to a number of people who have reported losing their jobs because of circumstances outside of their control caused by family violence. For example, our clients have reported being dismissed because: their estranged partner telephoned them constantly at work; they had to take time off work to report property damage and stalking to the Police, attend intervention order proceedings and ensure their child’s safety; and their employer refused to make adjustments to enable compliance with an intervention order. This unfair treatment could be reduced by introducing an explicit protection against discrimination on the basis of family violence into the EO Act.

**Recommendation 5:** Include “experiencing family violence or stalking” as a protected attribute in section 6 of the EO Act.

# Regulatory options

As noted in the background paper, the current regulatory landscape for labour hire and insecure work in Victoria is multifaceted, with various federal and state laws at play. Currently, the employer/employee relationship is central to the regulation of workplace rights and entitlements in Victoria. However, as identified in the background paper, many conditions and protections afforded to ongoing and long-serving casual employees are not extended to those in labour hire and other insecure employment arrangements.

As evidenced by the examples above, workers in insecure employment and those subject to labour hire arrangements, are particularly vulnerable to exploitation. This risk is heightened for women workers, migrant workers, workers with disability and victims of family violence.

This lack of protection, particularly in relation to discrimination issues, is further compounded by a regulatory framework that relies on individual complaints. Relying solely on individuals to enforce discrimination laws is ineffective due to the many barriers that they face, including reputational risk (which may lead to long-term unemployment), psychological vulnerability (often due to the harm caused by the unlawful treatment), lack of access to supporting evidence and witnesses (who are often employed by the Respondent), legal and medical costs, and the low cost benefit of pursuing a complaint due to low awards of compensation. Notably, the cost benefit of pursuing an employment or discrimination complaint for labour hire workers is often worse because they are lower paid. The bulk of compensation in such disputes is generally made up of lost earnings or other employment entitlements, so if this loss is low then any award of compensation (and financial consequence for the employer) will also be minimal.

**Alice’s experience**

In her late twenties Alice worked for a motorbike retailer. A co-worker regularly made offensive sexual comments to her, including “I’d like to tie you up and whip you”, “are you the type of girl who, if I came in a shot-glass, would drink it?”:, and asking male customers “are her boobs the same size as your girlfriend’s boobs?” The co-worker made these numerous offensive comments and also forcefully grabbed Alice’s bottom in front of Alice’s manager and other co-workers.

The manager would not take action against the co-worker in support of Alice because he was scared of the individual employee. While her former co-workers witnessed the harassment, they were unwilling to give evidence in support of Alice’s complaints because it was likely that they would be victimised at work.

Further, Alice was traumatised by the incident and did not have the emotional resources or social supports needed to pursue lengthy litigation. She was diagnosed with depression, for which she was receiving treatment from a psychiatrist, and had ended her relationship with her boyfriend because she developed a distrust of men.

Alice settled her claim for a relatively low amount of compensation due to the difficulties proving her complaint in court. There were no consequences for the individual worker.

**Recommendation 6:** Re-enact Part 9 of the EO Act as it was at 28/04/2010 to empower the Victorian Equal Opportunity and Human Rights Commission to more freely investigate breaches of the EO Act; issue enforceable undertakings and improvement notices; and apply to VCAT to enforce compliance with those undertakings and notices.

**Brooke’s experience**

Brooke was employed by an employment agency to work casually for a security company. While working for the company, Belinda was subjected to sexual harassment by a team leader at the company, Simon.  At first she did not complain, as she was desperate for work and did not want the company to cut her shifts. Competition for shifts was fierce. Following an incident when Simon followed her home, she did complain to her line manager who escalated her complaint to HR. The company HR representative advised Brooke that they had spoken to Simon, and that he had said the conduct was a “two way street”. HR also informed her employment agency, who was very angry with Brooke for not reporting the matter to them first. The employment agency then commenced an investigation, and found Belinda’s complaints “substantiated”.  The company sacked Simon. The employment agency then told Brooke that the company no longer wanted her to work there. Brooke stayed on the employment agency’s books, but received no work elsewhere.

As noted in the Background Paper, there have been recommendations to impose responsibility for workers’ employment entitlements on both host organisations and labour hire suppliers. There have also been calls for the establishment of a national licencing scheme for labour hire operators to ensure compliance with minimum employment standards and protections.

We note that the concept of “joint employment” is well established in the United States.[[2]](#footnote-2) This ensures that where both the labour hire agency and the host organisation enjoy the benefit of acting as the employer they are also subject to the normal obligations and regulation of employers, addressing the avoidance of labour regulation by labour hire arrangements. The potential application of this concept has also been recognised by Australian courts and tribunals.[[3]](#footnote-3) Consideration should be given to introducing a statutory relationship of joint employment in Australia.

Another approach worth further consideration may be to introduce licencing requirements for labour hire firms, so that in order to lawfully operate, their contracts with host companies contain mandatory terms such as:

* Host companies fulfil their legal obligations to protect labour hire staff in the host company workplace from bullying, discrimination and unsafe work practices.
* If labour hire staff make a complaint of bullying, discrimination and unsafe work practices the labour hire agency will investigate, at the host company’s expense.
* A substantiated complaint by a staff member of the labour hire agency would entitle the agency to terminate the contract with the host company and damages for the breach by the host company would be payable by the host company.

However, this should not replace the creation of appropriate statutory obligations owed by the host company to the worker, as the worker would not be able to enforce the terms of such contracts between host companies and labour hire agencies.

1. See esp Craig Dowling, ‘Joint Employment and Labour Hire Relationships’ (5 October 2015). [↑](#footnote-ref-1)
2. Craig Dowling, ‘Joint Employment and Labour Hire Relationships’ (5 October 2015) 14-15, referring to the *National Labor Relations Act 29 USC §§ 151-169* (1935); the *Fair Labor Standards Act 29 USC §§ 201-219* (1938). (A copy of this document can be provided upon request). [↑](#footnote-ref-2)
3. See, for example, *Coghill v Indochine Resources Pty Ltd*[2015] FCA 377 (Katzmann J, 23 April 2015) at [30]; *Fair Work Ombudsman v Eastern Colour Pty Ltd*[2011] FCA 803, (2011) 209 IR 263 (Collier J, 19 July 2011); ***Orlikowski v IPA Personnel Pty Ltd*** [2009] AIRC 565, (2009) 185 IR 127 (SDP Lacy, 26 June 2009) among others, as cited in Craig Dowling, ‘Joint Employment and Labour Hire Relationships’ (5 October 2015) 15-18. (A copy of this document can be provided upon request). [↑](#footnote-ref-3)