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RESPONSE OF THE INCOME SECURITY ADVOCACY CENTRE TO THE CHANGING WORKPLACES REVIEW SPECIAL ADVISORS' INTERIM REPORT

OCTOBER 14, 2016

Part One: Introduction

According to its terms of reference, the purpose of the Changing Workplaces Review is "to improve security and opportunity for those made vulnerable by the structural economic pressures and changes being experienced by Ontarians in 2015." This mandate arises directly from well-recognized shifts in Ontario's economy over the past several decades that have both increased precariousness of its workforce and increased pressure on employers to cut costs by limiting legal obligations to their own workers. This mandate is premised on one simple fact: Our current legislative framework is failing. To be successful on its own terms, this review must counteract this shift. The *status quo* is not an option.

The Review provides an unprecedented opportunity to tackle the root causes of precarious work. The *Employment Standards Act* (ESA) and *Labour Relations Act* (LRA) include exemptions and loopholes that make precarity possible – even likely – and allow employers to evade their responsibilities under the law. We need to close the gaps in legislation that contribute to precarious work and that, left unchecked, will continue to exert downward pressure on the wages and working conditions of all workers.

We recognize that the Special Advisor's mandate included balancing the needs of workers and business. However, we caution against unquestioningly accepting business rationales, in particular the need to improve flexibility in an increasingly globalized world.

Too often, flexibility is a code word for precarity that benefits only employers. The need for "flexibility" can be used to justify almost any limit on worker rights, from limits on hours of work to minimum wages to workplace safety. The relationship between worker rights and corporate rights is already out of balance. Achieving the goal of decent work will require constraining the "flexibility" that many employers demand.

Initially the particular vulnerabilities faced by migrant workers were carved out of the Advisors' review, to be considered under a separate process. It is now clear that there is no separate process. As the Changing Workplaces Review is the only process, we urge the Special Advisors to address the particular issues facing migrant workers. All of the vulnerabilities that this review is intended to address are endemic in migrant worker jobs: racialized and gendered workplaces and low-wage work in non-unionized and dangerous working conditions. But migrant workers' already extensive vulnerabilities are amplified by their temporary status and the fact that their work permits are tied to one employer. There is no other job in Canada if they rock the boat: deportation is swift.

We have reviewed and wholly endorse the submissions made by the Workers Action Centre & Parkdale Community Legal Services ("WAC/PCLS") ("Building Decent Jobs from the Ground Up") and Migrant Workers Alliance for Change ("MWAC") ("Ensuring Migrant Worker Fairness").

In these submissions, we highlight the areas that fall within ISAC's particular mandate.

Like WAC/PCLS and MWAC, we call on the Special Advisors to reject options that will introduce more precarity to Ontario's labour market and instead recommend a bold and comprehensive vision that uproots the structural sources of precarious employment.

Systemic labour market problems cannot be fixed with Band-Aid solutions. Effective change will require raising minimum standards for all workers, a vastly improved enforcement system and removing the barriers to collective bargaining that exclude most people in precarious work.

Part Two: Who We Are

The Income Security Advocacy Centre (ISAC) is a specialty legal clinic funded by Legal Aid Ontario. Established in 2001, we have a provincial mandate to advance the systemic interests and rights of low-income Ontarians with respect to income security programs and employment through test-case litigation, policy advocacy, and community organizing.

ISAC works closely with Ontario's 60 community legal clinics, which assist low-income Ontarians in their local areas. We also work with community and advocacy groups and organizations across Ontario and Canada on provincial and national issues.

Since our inception, ISAC has advocated for the income security of all low-income people in Ontario through reform of benefit programs and systems, rate increases in income security programs, the adoption and implementation of provincial poverty reduction strategies, and improvements in the labour market.

Part Three: Improving Employment Standards

i. Expand the Definition of an Employee

The purpose of the ESA is best met by making its definition of employee as expansive as possible, so that all workers can enjoy minimum workplace standards. However, the current definition of employee is so narrow that it undermines the ESA's ability to protect workers in the modern economy.

As noted in the Interim Report, "the old definitions [of an employee] are not well suited to the modern workplace."[1] The gradual "fissuring" of the Ontario economy has resulted in the continued growth of "non-traditional" employment relationships – indeed, as the Report notes, the growth of non-traditional employment has vastly outpaced the growth of traditional, stable jobs.

It is unsurprising then, that in interpreting and developing the common law, courts have long recognized individuals who may not fit the strict definition of an employee, but are nevertheless deserving of protections. Since at least 1936, the courts in Ontario have recognized an intermediate category between truly independent contractors and full employees, entitled "dependent contractors".[2]

The ESA is unfortunately behind the times on this issue. The current definition in the Act limits its scope to:

> s. 1(1)(a) a person, including an officer of a corporation, who performs work for an employer for wages,
>
> (b) a person who supplies services to an employer for wages,
>
> (c) a person who receives training from a person who is an employer, as set out in subsection (2), or
>
> (d) a person who is a homeworker,
>
> and includes a person who was an employee.[3]

In other words, the protections of the Act do not extend to those who may not meet this limited definition of an employee. This encourages employers to hire "contractors" rather than employees, or even to misclassify their workers as "dependent contractors" in order to avoid statutory obligations.

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[1] *Changing Workplaces Review: Special Advisors' Interim Report*, at p. 144.

[2] *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290 at p. 257.

[3] *Employment Standards Act, 2000*, S.O. 2000, c. 41, at s. 1(1)

To contrast, and as noted in the Interim Report, the LRA does extend its protections to dependent contractors.

If the courts have recognized dependent contractors for the past 70 years, it is long overdue that the ESA does the same.

We agree with WAC/PCLS that **the ESA definition of "employee" must be expanded to include dependent contractors.** As argued by WAC/PCLS, there should be no exemptions from expanding the scope of the ESA to include dependent contractors. As they observe, "not only would exemptions create gaps in the ESA coverage, but they would make enforcing the new boundary of ESA coverage even more difficult."[4]

We would also **wholly endorse the WAC/PCLS recommendation that the ESA provide for a presumption of employee status, in the case of a dispute as to the worker's status**. Such a presumption would help to prevent employers from misclassifying employees.

ii. Expanding the definition of "employer"

Equally important to the definition of an "employee" under the ESA is the scope of the term "employer". As long as employers can avoid their responsibilities to workers through complex webs of sub-contracts and corporate arrangements, the ESA will be failing in its purpose, and more of Ontario's workers will be left behind.

More and more employers have adopted strategies involving the contracting out of labour, in order to drive up profits and reduce the liabilities they have to the employees

[4] Workers Action Centre & Parkdale Community Legal Services (September 2016), "Responding to the Changing Workplaces Review" at p. 11.

who make their goods or provide their services.[5] These practices drive down working conditions by creating competitive conditions for cheap labour at the bottom of the chain, while insulating the company at the top of the chain. This trend has created both more precarious employment and increased instability among small employers, as they "often have more uncertain relationships with their own workers."[6]

The courts have responded, at least in part, to these developments. They have recognized that the notion of an "employer" adopted at common law "should be one that recognizes the complexity of modern corporate structures but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees."[7] Accordingly, the courts have found that two or more corporations or individuals can be jointly and severally liable as "common employers" wherever they are sufficiently connected *vis a vis* the work of the employee.[8]

To contrast, the ESA's extension of liability beyond an individual's direct employer is severely limited and further requires that the employee show that the "intent and effect" of their corporate strategy is to defeat the intent and purpose of the ESA (except with regard to temporary help agencies). This is a stricter standard than that required by common law, and, as noted in the Interim Report, is rarely met. Furthermore, as noted in the Interim Report, Ontario is the only province that limits its "related employer" with an "intent and effect" provision.

We strongly recommend that the ESA be extended to include "common employers", and that all common employers be deemed jointly and severally liable for violations of the Act. We further urge the Advisors to suggest removing the "intent and effect" clause from the ESA's common employer section. Given the trends detailed in the Interim

[5] *Changing Workplaces Review: Special Advisors' Interim Report*, at pp. 27-29.

[6] *Changing Workplaces Review: Special Advisors' Interim Report*, at p. 28

[7] *Downtown Eatery (1993) Ltd. v. Ontario*, 2001 CanLII 8538 (ON CA), at para. 36

[8] *King v. 1416088 Ontario Ltd.*, 2014 ONSC 1445 (CanLII); *Downtown Eatery (1993) Ltd. v. Ontario*, 2001 CanLII 8538 (ON CA), at para. 34

Report's opening sections, such a change lies at the core of this review's mandate and broader purpose.

This approach could be further strengthened by adopting a remedy like the oppressions remedy under the *Ontario Business Corporations Act* in the context of ESA proceedings. Such a remedy in this context would allow workers to seek unpaid wages in court or before the Ministry when their employer has acted in a way that prejudices or disregards their interests.

We would add that strengthening the scope of the ESA to apply liability among connected employers and corporate entities would also reduce the incentive to misclassify employees. Accordingly, such a change could alter the economic model most profitable for companies in Ontario, requiring that companies on top of the production chain have to concern themselves with whether basic employment standards are provided by the companies they direct.

Accordingly, we would urge that the Advisors adopt the WAC/PCLS recommendations in this regard:

- **Amend the ESA to make companies and corporate directors jointly and severally liable for the ESA obligations of their contractors, subcontractors and other intermediaries, so long as sufficient interconnectedness between them can be established, *vis a vis* the work of the employee;**

- **Create a joint employer test similar to the policy developed by the U.S. Department of Labour;**

- **Make franchisors jointly and severally liable for the employment standards obligations of their franchises;**

- **Repeal the "intent of effect" requirement in Section 4 of the ESA "related employer" provision;**

- **Establish an "oppressions" remedy under the ESA when companies make their assets unavailable; and**

iii. End exemptions from the ESA

Only one quarter of Ontario employees are fully covered under the ESA.[9] Over the years, exemptions and special rules have been introduced in response to industry or business requests with little or no involvement of the workers affected by such exemptions. These exemptions strongly favour employers, with the cumulative costs of exemptions from minimum wage, overtime pay, holiday pay, and vacation pay potentially taking as much as $45 million out of the pay cheques of workers each week.[10] The social costs of increased stress, poor health, poverty and insecurity are incalculable.

The extent of exemptions seriously undermines the principles of fairness, minimum standards and universality that are intended to be the hallmarks of the ESA. The elimination of exemptions must be a goal of this review. Below we address the Advisors' approach of dividing the existing exemptions into three categories.

a) "Category 1" Exemptions should be eliminated immediately

We endorse the Advisor's proposal to remove existing exemptions identified in "Category 1": IT professionals, pharmacists, managers and supervisors, residential care workers, residential building superintendents, janitors and caretakers, special

[9] Workers Action Centre & Parkdale Community Legal Services (September 2016), "Responding to the Changing Workplaces Review" at p. 15.

[10] Vosko, Leah F., Andrea M. Noack and Mark P. Thomas (2016), "How Far Does the Employment Standards Act 2000 Extend, and What Are the Gaps in Coverage? An Empirical Analysis of Archival and Statistical Data" at p. 30.

minimum wage rates for students and liquor servers, student exemption from the three-hour rule.

b) "Category 3" Exemptions: Immediately end exemptions in agriculture and domestic work; enshrine principles governing exemptions in statute and require neutral and periodic review

The exemptions identified as "Category 3" are those that the Special Advisors suggest may be reviewed in a new process.

Many of the industries on that list rely heavily on migrant workers, including (but not limited to):

- Canning, Processing, Packing or Distribution of Fresh Fruit or Vegetables (seasonal);
- Domestic Workers (Employed by Householder);
- Hospitality Industry Employees
- Agricultural Exemptions

As noted in the introduction, migrant workers have additional vulnerabilities related to their temporary immigration status and the legal requirement that they can only work for the employer named on their work permit. Such workers have virtually no bargaining power and exemptions greatly increase the likelihood of exploitation. Ending exemptions in such industries must be a priority.

We urge the Advisors to adopt MWAC's recommendation **that agricultural workers be immediately entitled to all the following ESA rights: minimum wage (including abolishing payment by piece rate), overtime, vacation and holiday pay, hours of**

work, daily and weekly/bi-weekly rest periods, eating periods, and time off between shifts.[11]

The Special Advisors have recommended several options for a process for reviewing exemptions and special rules. **We adopt the WAC/PCLS recommendation that the following principles and criteria for any such review be enshrined in legislation**:[12]

Principles:

- Universality and fairness of minimum standards is presumed.
- That there be substantive fairness in the process of reviewing exemptions that recognizes the power imbalances in the employment relationship.

Criteria

- Economic cost of complying with the standard(s) is rejected as a rationale.
- The onus to meet these criteria is on the employer or industry seeking to use an exemption or special rule.
- The economic and social cost of the exemption to workers who would have their standards reduced shall be considered.
- The nature of the work (not the employer's organization of the work) is such that applying the standard would preclude a type of work from being done at all.
- The industry or business provide equal or greater benefit in compensation or alternative arrangements in instances where exemptions are permitted.

We agree with WAC/PCLS that **<u>all</u> remaining exemptions should be reviewed by an independent commission within 18 months and any that fail to meet the above criteria should be eliminated. Any exemptions that remain in place following that**

[11] Migrant Workers Alliance for Change (September 2016), "Ensuring Migrant Worker Fairness: Response to the Changing Workplaces Review Special Advisors' Interim Report" at p. 20.

[12] Workers Action Centre & Parkdale Community Legal Services (September 2016), "Responding to the Changing Workplaces Review" at p. 16.

review should continue to be reviewed periodically to determine whether the criteria are still being met.

c) "Category 2" exemptions should be subject to the same review as Category 3

We agree with WAC/PCLS that the **industries identified as Category 2 must be part of the same review process as those in Category 3**.[13] **Periodic review must be built into any exemptions**, not only to determine whether they are still necessary, but also to ensure that there has not been slippage from the intended scope of the exemptions or misclassification by employers improperly seeking to rely on exemptions.

iv. Hours of Work and Overtime: Reduce Hours and Ensure Workers Have the Right to Refuse Overtime

When it comes to hours of work, Ontario's employment regime is an outlier, permitting some of the longest work days and weeks in the country and giving employers enormous flexibility for overtime even beyond this standard. For many workers in non-unionized workplaces, the right to refuse overtime is illusory in light of the very real risk of job loss for those who seek to rely on this right.

Given this reality, it is troubling that the majority of the Advisors' options on hours of work involve restricting or reducing workers' rights to refuse overtime, reducing required rest periods between shifts, and reducing Minister of Labour oversight of excessive hours of work and overtime averaging.

[13] Workers Action Centre & Parkdale Community Legal Services (September 2016), "Responding to the Changing Workplaces Review" at p. 18.

We reject most of the options presented by the Advisors. We believe that the focus should be on reducing hours and the elimination of widespread violations of overtime and hours of work standards. Workers need leisure time in order to protect their health, connect with their community and families, and to ensure safe workplaces. On principle, the ESA should not legislatively enable employers to use staffing strategies predicated on overtime and regular longer working days to meet production needs.

We endorse WAC/PCLS's comments and alternative recommendations, summarized below:[14]

- **Establish a maximum 8-hour workday and 40-hour week after which overtime is paid:** Workers should retain the right to refuse work beyond the 8-hour day and the 40-hour work week. We support the Special Advisors' "Option 11", which would require that overtime be paid at time-and-a-half (or taken as paid time off in lieu) after 40 hours.

- **Repeal all overtime averaging provisions:** Overtime averaging allows employers to enter into agreements with workers to average hours of work over a period longer than one week for determining workers' overtime pay. Averaging agreements always lower the amount of overtime pay owed to workers. These agreements ignore the power imbalances in the workplaces that the ESA is supposed to address. Workers in non-unionized workplaces have no real power to refuse to sign averaging agreements without penalty, enabling employers to effectively contract out of overtime pay requirements. Some workers have also reported that when Ministry of Labour inspections detect overtime pay violations, the employer is told to enter into overtime averaging agreements to bring the employer into compliance. Such practices must end.

[14] Workers Action Centre & Parkdale Community Legal Services (September 2016), "Responding to the Changing Workplaces Review" at p. 22.

- **Overtime approvals/permit should only be given in exceptional circumstances and workers must retain the right to refuse:** Ministry of Labour approval for overtime in excess of 48 hours a week should only be given in exceptional circumstances and be conditional on demonstrated efforts to recall employees on layoff; offer hours to temporary, part-time, and contract employees; and/or hire new employees. Annual caps of no greater than 100 hours per employee should be set on overtime hours allowed by permits. Workers should retain the right to refuse overtime when their employer has been granted an overtime approval.

- **Maintain the right to refuse overtime and Ministerial oversight of employer-employee agreements to vary or reduce hours of work standards.**

v. End the Precarity of Part-Time and Temporary Work

The plight of temporary and part-time workers in Ontario is at the heart of this review. Indeed, the purpose of the review is to update current worker-protection laws to keep pace with a workplace increasingly dominated by exactly this type of work. Part-time and temporary workers earn less than their full-time colleagues, and are almost universally given less access to benefits. Further, most part-time and temporary workers are also denied key benefits under the ESA, such as termination notice/pay and severance pay.

The Interim Report also notes that women and recent immigrants are over-represented in part-time work, and are therefore less protected under the ESA.[15] Given the trends noted throughout the Interim Report, maintaining the *status quo* in this context would be particularly damaging for workers in Ontario's future economy and would further

[15] *Changing Workplaces Review: Special Advisors' Interim Report*, at p. 222.

exacerbate the inequitable treatment of historically disadvantaged groups.

It is time that Ontario followed Quebec, Saskatchewan and the European Union in requiring parity in wages and benefits between full-time and equivalent part-time/temporary employees. Employers should no longer be able to discriminate against certain groups of workers by only providing benefits to some workers and not others based on employment status or hours worked.

Accordingly, we would urge that the Advisors adopt the WAC/PCLS recommendations in this regard:

- **The ESA should require that part-time, temporary, contract and casual employees receive equal treatment in pay, benefits and working conditions as full-time employees doing comparable work unless there are objective factors to justify the difference**.

We also endorse the WAC/PCLS recommendations regarding fixed-term contracts: **for fixed term contract workers, the number and total duration of contracts should be capped. We recommend a one year cap on term of contract after which appropriate termination and severance provisions apply. The goal should be conversion of contracted employees to permanent employees where the position is not truly temporary. Just-cause protection must be provided to contract workers if, at the end of a contract, another worker is hired to do the work previously done by the temporary contract worker.**

vi. Increase "Termination Pay" and ensure more workers are entitled to it

In the Interim Report, the advisors rightfully note that "because of the costs and delays surrounding suing for wrongful dismissal and the unpredictability of the result, many employees settle for their ESA entitlements even though what they are entitled to under

the ESA may be less – sometimes substantially less – than the damages they would be entitled to receive at common law."[16]

The very low entitlement to Termination and Severance pay under the ESA also undermines whether an individual can afford legal assistance to pursue ESA remedies at all following the termination of their employment. Legal assistance and advice can make a real difference in securing payment of Termination and Severance pay, but many lawyers will not act in ESA cases because payment available through typical fee arrangements such as contingency fees (where the lawyer is paid a percentage of any winnings) do not come close to covering their costs.

In this regard, Termination and Severance pay are more than simply entitlements under the ESA: they are a core part of access to justice. In this sense, they should be considered alongside the ESA's scope and enforcement provisions, as a core underlying component of the ESA's overall effectiveness.

Like reasonable notice at common law, Termination Notice and Termination Pay are intended to provide employees with notice or pay in lieu of notice, for the period in which they need to look for new employment following termination. However, at current rates, the ESA offers one week of termination notice/pay for every year of service, up to a maximum of 8 weeks. This is grossly insufficient to meet the needs of Ontario's workers, who are facing an increasingly precarious workplace.

Furthermore, while this is one of the ESA's most basic guarantees, it is not granted to nearly enough workers in Ontario. One out of 10 workers are exempt from termination notice and pay because they are either exempted under the Regulations, are seasonal workers with extended breaks in their employment, or have worked less than three months at the time of their termination.

[16] *Changing Workplaces Review: Special Advisors' Interim Report*, at p. 229.

Indeed, the Interim Report notes that the growth in temporary employment far outpaces that of permanent employment. The three month restriction directly targets this ever increasing group, who are often most in need of the ESA's protection.

Further, the Act treats any cessation of work that last 13 weeks or more as a termination of the employment relationship. While this rule is helpful for workers facing an extended layoff (less than 13 weeks), it denies access to sufficient termination pay (or any termination pay at all) for seasonal workers, such as those in agriculture. Along with WAC/PCLS, we wholly endorse the recommendation that **the ESA provide that seasonal workers with breaks longer than 13 weeks have their entire seniority with one employer recognized for the purposes of calculating termination notice and pay**.

To that end, we agree with WAC/PCLS that the following changes are necessary:

- **Remove the 8-week cap on Termination Notice/Pay;**
- **Eliminate the three-month eligibility requirement for Termination Pay;**
- **For individuals with recurring periods of employment, require employers to provide termination notice/pay based on the total length of the employee's employment.**

vii. Extend the right to Severance Pay

Severance Pay is meant to compensate an employee for more than simply the amount of time it will take them to find new work: rather, it is meant to recognize an employee's broader commitment to their employer over time.

Under the ESA, only workers who have worked five or more years with a single employer are entitled to Severance Pay. Further, it is limited to employees who work for companies with a payroll in Ontario of at least $2.5 million or that undertake a mass

layoff, in which case the ESA's mass-layoff provisions apply. Given these limitations, it is unsurprising that fewer than 40% of Ontario's workers actually qualify for severance pay. Indeed, with 95% of business in Ontario employing less than 50 employees, it's surprising that the number of individuals covered is as high as it is.

Like Termination Notice/Pay, severance pay is equal to one week's pay per year of service. However, unlike Termination Notice/Pay, Severance Pay can reach a maximum of 26 weeks.

We endorse the WAC/PCLS recommendations regarding Severance Pay: specifically that the **seniority, payroll and firm size thresholds for Severance Pay be eliminated**, and that **the 26-week cap on Severance Pay be eliminated.** Workers who have stayed with one employer for over 26 years deserve recognition of their devotion, and security as they either retire or seek other work.

viii. Extend "Just Cause for Dismissal" Protection to Non-Unionized Workers

The Special Advisors have included the possibility of extending "just cause" protection to all employees. We strongly support this option.

Currently, an employer can dismiss non-unionized workers for any reason (with the exception of Human Rights violations). This leads to arbitrary and unfair terminations with no recourse, so long as the employer has provided the notional Termination Notice described above.

Enshrining a requirement that workers be dismissed only for just cause would prevent arbitrary and unfair terminations; enhance job security; avoid the negative impacts on workers who have been summarily dismissed; and provide the possibility for reinstatement.

Furthermore, there are key elements in the Temporary Foreign Worker structure that require the adoption of specific strategies for migrant workers. Under the Temporary Foreign Worker Program, workers are tied to one employer and face enormous barriers to securing new employment when a dismissal takes place. Those hired on a seasonal basis, such as through the Seasonal Agricultural Workers Program, face immediate deportation back to their home countries when unjustly dismissed, injured on the job, or fired for attempting to enforce their rights.

These workers need an expedited adjudication process. Such a process would provide individual migrant workers with protection against reprisals and unfair termination.

We endorse the WAC/PCLS key recommendations:[17]

- **Just Cause Protection for All Workers:** require employers to have "just cause" for terminating an employee's employment to protect workers from unjust dismissal.

- **Expedite Adjudication for Migrant Workers:** the ESA must implement an expedited adjudication process for migrant workers who have been unjustly dismissed, in order to prevent a rapid deportation from undermining their access to this important right.

- **Prohibit Deportation Before a Claim has Been Determined:** The ESA should explicitly prohibit an employer from forcing "repatriation" on an employee who has filed an ESA complaint.

[17] Workers Action Centre & Parkdale Community Legal Services (September 2016), "Responding to the Changing Workplaces Review" at p. 40.

ix. Regulate migrant worker recruiters

Migrant workers in low-waged jobs are paying up to two years' salaries in fees to unregulated recruiters working in Ontario. In addition, many workers come to Canada based on false representations made by recruiters about the kinds of working conditions and wages they can expect.

Migrant workers often come to Canada to work in order to send money back home to help their families. Workers are afraid to complain about ill treatment, and indeed there are cases in which workers were deported when they complained about recruitment fees. There are reports of recruiters punishing entire communities by blacklisting their ability to work in Canada.[18]

Employers simply enjoy the benefits that come from recruiters, while placing the blame on recruiters for the problems that arise.

For these reasons, Ontario needs effective enforcement tools to hold recruiters and employers accountable.

We endorse MWAC's call for:[19]

- **Compulsory licensing and publication of recruiters;**
- **The use of financial bonds;**
- **Compulsory registration of employers;**
- **Joint and several liability between recruiters and employers;**
- **Mandatory reporting of recruiter supply chains in Canada and abroad;**

[18] Migrant Workers Alliance for Change (September 2016), "Ensuring Migrant Worker Fairness: Response to the Changing Workplaces Review Special Advisors' Interim Report" at p. 24.

[19] Migrant Workers Alliance for Change (September 2016), "Ensuring Migrant Worker Fairness: Response to the Changing Workplaces Review Special Advisors' Interim Report" at pp. 25-27.

- **Mandatory and detailed reporting of recruiters' business and financial information;**
- **Explicit recruiter liability for actions further down the recruiter's supply chain.**

ix. Effectively enforce the rights protected by the ESA

We agree with the Special Advisors that the ESA enforcement process has significant failings. As a result, too many people in too many workplaces do not enjoy their basic rights.

Of course, an enforcement system is only as strong as the rights it protects. Fixing the enforcement system without also making the substantive changes discussed above will have limited success in ameliorating the working conditions of precarious workers.

The responsibility for enforcing and complying with the ESA must remain with government and employers. We reject options that shift responsibility to non-unionized workers who have the least power, for all the reasons described by WAC/PCLS.[20]

In addition, the barriers to making ESA claims must be removed and violations need to be prevented as much as possible rather than simply compensated when rights are breached. We agree with WAC/PCLS that key steps that would make the ESA complaints system more effective include:

- **End the "self-help" hurdle:** Remove the ESA provision that allows the Ministry of Labour to require a worker to first attempt to resolve the violations with their

[20] Workers Action Centre & Parkdale Community Legal Services (September 2016), "Responding to the Changing Workplaces Review" at pp. 52-53. See also Migrant Workers Alliance for Change (September 2016), "Ensuring Migrant Worker Fairness: Response to the Changing Workplaces Review Special Advisors' Interim Report" at p. 22.

employer. Research conducted for the Changing Workplaces Review concludes that the decline in the number of claims filed between 2006/07 and 2014/15 can be tied to the barrier created by this "self-help" provision, rather than an upsurge in employer compliance with their ESA obligations.[21]

- **Establish options for anonymous complaints:** Workers must be able to file a claim confidentially, where the worker's name is known to the Ministry, but not to the employer. The Ministry of Labour should follow the policy of the Wage and Hour Division of the US Department of Labour to protect the confidentiality of the complainant in their investigations. If it is necessary to reveal a complainant's name to the employer, in order to pursue an investigation, then the Ministry must seek the permission of the worker to do so.

- **And Establish options for third party anonymous complaints:** Unions, community organizations, or other individuals or parties should be able to file anonymous complaints on behalf of an individual or a group of workers. Where individual or third party complaints refer to violations that affect more than one worker, then the workplace should be subject to an ESA inspection. Inspections of employers should aim to detect and assess monetary and non-monetary violations, remedy violations with orders to pay for all current employees, and bring the employer into compliance for the future. Anti-reprisal protections must be provided to workers, whether their complaint is anonymous or not. An appeal process should be available if the Ministry of Labour does not proceed with an inspection and if an inspection proceeds, a report should be made available to <u>all</u> employees.

- **Place the onus on employers to disprove the complaint**: It can be very difficult for workers to gather the necessary evidence, when key information is

[21] Workers Action Centre & Parkdale Community Legal Services (September 2016), "Responding to the Changing Workplaces Review" at p. 54.

entirely in the hands of employers. A reverse onus would remove a significant barrier to making a claim.

- **Improve anti-reprisal protections:** There is widespread fear of reprisals amongst workers. The current anti-reprisal provisions do not protect workers while they are employed and the cost of reprisal to employers is not a significant deterrent to employers. ESA protections would be strengthened by: providing an expedited anti-reprisal process with the option of interim reinstatement; publicize anti-reprisal claims; prohibit employers of migrant workers from forcing deportation of an employee who has filed an ESA complaint. The Ministry of Labour should work with the federal government to ensure that migrant workers who have filed complaints are granted open work permits so that they may continue to work while their claim is investigated.

The Special Advisors have suggested various options that would move away from investigating all individual complaints and instead develop strategic enforcement strategies. We oppose any amendments that would reduce the requirement to reduce individual claims. There is no escaping the fact that an effective enforcement system requires resources: it cannot be done on the cheap. But it can be partially funded by imposing more substantial penalties on violators.

Instead, as WAC/PCLS argue, the enforcement system must:

- **Investigate all individual complaints:** The current requirement to investigate all individual claims of employment standards violations must be maintained.

- **Proactive Inspections:** The Ministry of Labour should target proactive inspections in workplaces where misclassification takes place and where migrant and other people in precarious work are employed. Any such inspections must ensure that they do not further jeopardize migrant workers.

- **Conduct inspections when individual claims confirmed:** The Ministry of Labour must adopt a consistent strategy of expanding investigations when ESA violations are confirmed through individual claims to a full inspection of the employer.

- **Increase the fees payable by violators:** The ESA should increase the administrative fee payable when a restitution order is made to include the costs of investigations and inspections.

- **Ensure settlements don't make violations cheaper than compliance:** The ESA should establish criteria for settlement of complaints, in which settlements cannot be for less than a worker's legal entitlement.

- **Impose significant consequences for violations:** Right now, there are more advantages to those violating the law than to those adhering to the law. Key changes that will reverse this trend include: automatic fines for all violations; increased fines; requiring employers to pay damages equal to twice the unpaid wages owing; requiring employers to pay interest on wages owing.

- **Ensure workers get what they are owed:** The province must establish a provincial wage protection plan, paid for by employers. The Ministry of Labour must have the authority to issue warrants and/or place liens on personal property; extend liability to the recipient of a debtor's assets; impose wage liens on an employer's property upon filing of a complaint where there is a risk of non-payment; require a bond to cover future unpaid wages where there is a history of contraventions or in sectors with high rates of violations; revoke licences and permits for those who fail to pay.

Part Four: End the exclusions from the *Labour Relations Act* for migrant worker dominated sectors

One of the best ways to help vulnerable workers in precarious jobs is to expand collective organizing, representation, and bargaining in workplaces and industries with precarious work. We endorse all of the LRA recommendations made by WAC/PCLS but will focus our comments here to LRA exclusions that create particular disadvantage for migrant workers.

There are two key sectors that are dominated by migrant workers that are expressly excluded from the LRA: domestic workers and agricultural workers.

Some of the alleged reasons for these exclusions include the existence of an intimate social bond between domestic workers and their employers and the uniqueness of agricultural and horticultural work (seasonal, variable climates, perishable products, need for continuous care). As MWAC correctly notes, these supposedly unique characteristics have all been soundly debunked.[22]

On the other hand, there are some unique aspects of migrant worker employment relationships that should be taken into account in designing an effective labour relations scheme: a triangular employment relationship. Where work is obtained through recruitment agencies, a triangular relationship can often result with the worker obligated to both an employer and a recruiter. Abuse is very common in these relationships.

We endorse the calls by WAC/PCLS and MWAC to:[23]

- **Remove the exclusion of domestic workers from the LRA (including workers under the Caregiver Program)**

[22] Migrant Workers Alliance for Change (September 2016), "Ensuring Migrant Worker Fairness: Response to the Changing Workplaces Review Special Advisors' Interim Report" at p. 12.

[23] Workers Action Centre & Parkdale Community Legal Services (September 2016), "Responding to the Changing Workplaces Review" at pp. 74-75; Migrant Workers Alliance for Change (September 2016), "Ensuring Migrant Worker Fairness: Response to the Changing Workplaces Review Special Advisors' Interim Report" at p. 13.

- **Remove LRA exclusions of agricultural and horticultural workers and repeal the *Agricultural Employees Protection Act*:** Ontario lags behind the entire country as the only jurisdiction where farmworkers lack the right to effectively unionize and bargain collectively.[24]

- **Adopt sectoral bargaining and representation that fully enables workers to unionize and bargain collectively:** Meaningful models of collective bargaining require the participation of migrant workers in their development. Without such participation, any broader-based bargaining models would lack both legitimacy and effectiveness. For work that is spread out to different locations, the goal should be to enable workers to organize and bargain collectively from multiple locations with the same employer/franchisor. For sectoral bargaining, there must be a process for designating an employer entity that is the counterpart in bargaining and to recognize the triangular relationship involved in some employment relationships involving recruitment agencies and employment agencies.

[24] With the exception of farms in Quebec with less than three full-time employees.

Part Five: Summary of Recommendations

i. Expand the Definition of an "Employee"

1. The ESA definition of "employee" must be expanded to include dependent contractors

2. The ESA must create a presumption of employee status in the case of a dispute as to the worker's status.

ii. Expand the Definition of "Employer"

3. Amend the ESA to make companies and corporate directors jointly and severally liable for the ESA obligations of their contractors, subcontractors and other intermediaries, so long as sufficient interconnectedness between them can be established, *vis a vis* the work of the employee;

4. Create a joint employer test similar to the policy developed by the U.S. Department of Labour.

5. Make franchisors jointly and severally liable for the employment standards obligations of their franchises.

6. Repeal the "intent of effect" requirement in Section 4 of the ESA "related employer" provision;

7. Establish an "oppressions" remedy under the ESA when companies make their assets unavailable; and

iii. End Exemptions from the ESA

8. "Category 1" Exemptions should be eliminated immediately: IT professionals, pharmacists, managers and supervisors, residential care workers, residential building superintendents, janitors and caretakers, special minimum wage rates for students and liquor servers, student exemption from the three-hour rule.

9. Agricultural workers must be immediately entitled to all the following ESA rights: minimum wage (including abolishing payment by piece rate), overtime, vacation and holiday pay, hours of work, daily and weekly/bi-weekly rest periods, eating periods, and time off between shifts.

10. The following principles and criteria for any "exemption" reviews should be enshrined in legislation:

    Principles:
    - Universality and fairness of minimum standards is presumed.
    - That there be substantive fairness in the process of reviewing exemptions that recognizes the power imbalances in the employment relationship.

    Criteria
    - Economic cost of complying with the standard(s) is rejected as a rationale.
    - The onus to meet these criteria is on the employer or industry seeking to use an exemption or special rule.
    - The economic and social cost of the exemption to workers who would have their standards reduced shall be considered.
    - The nature of the work (not the employer's organization of the work) is such that applying the standard would preclude a type of work from being done at all.
    - The industry or business provide equal or greater benefit in compensation or alternative arrangements in instances where exemptions are permitted.

11. All remaining exemptions should be reviewed by an independent commission within 18 months and any that fail to meet the above criteria should be eliminated. Any exemptions that remain in place following that review should continue to be reviewed periodically to determine whether the criteria are still being met.

12. Industries identified by the Special Advisors as "Category 2" must be part of the same review process recommended for those in Category 3.

13. Periodic review must be built into any exemptions.

iv. Hours of Work and Overtime: Reduce Hours and Ensure Workers Have the Right to Refuse Overtime

14. Establish a maximum 8-hour workday and 40-hour week after which overtime is paid. Workers should retain the right to refuse work beyond the 8-hour day and the 40-hour work week. Overtime should be paid at time-and-a-half (or taken as paid time off in lieu) after 40 hours.

15. Repeal all overtime averaging provisions.

16. Overtime approvals/permit should only be given in exceptional circumstances and workers must retain the right to refuse. Ministry of Labour approval for overtime in excess of 48 hours a week should only be given in exceptional circumstances and

be conditional on demonstrated efforts to recall employees on layoff; offer hours to temporary, part-time, and contract employees; and/or hire new employees. Annual caps of no greater than 100 hours per employee should be set on overtime hours allowed by permits. Workers should retain the right to refuse overtime when their employer has been granted an overtime approval.

17. Maintain the right to refuse overtime and Ministerial oversight of employer-employee agreements to vary or reduce hours of work standards.

v. End the Precarity of Part-Time and Temporary Work

18. The ESA should require that part-time, temporary, contract and casual employees receive equal treatment in pay, benefits and working conditions as full-time employees doing comparable work unless there are objective factors to justify the difference.

19. For fixed term contract workers, the number and total duration of contracts should be capped at one year after which appropriate termination and severance provisions apply. The goal should be conversion of contracted employees to permanent employees where the position is not truly temporary. Just-cause protection must be provided to contract workers if, at the end of a contract, another worker is hired to do the work previously done by the temporary contract worker.

vi. Increase "Termination Pay" and ensure more workers are entitled to it

20. The ESA provide that seasonal workers with breaks longer than 13 weeks have their entire seniority with one employer recognized for the purposes of calculating termination notice and pay.

21. Remove the 8-week cap on Termination Notice/Pay.

22. Eliminate the three-month eligibility requirement for Termination Pay.

23. For individuals with recurring periods of employment, require employers to provide termination notice/pay based on the total length of the employee's employment.

vii. Extend the right to Severance Pay

24. The seniority, payroll and firm size thresholds for Severance Pay should be eliminated, and that the 26-week cap on Severance Pay be eliminated.

viii. Extend "Just Cause for Dismissal" Protection to Non-Unionized Workers

25. Require employers to have "just cause" for terminating an employee's employment to protect workers from unjust dismissal.

26. Expedite Adjudication for Migrant Workers: the ESA must implement an expedited adjudication process for migrant workers who have been unjustly dismissed, in order to prevent a rapid deportation from undermining their access to this important right.

27. Prohibit Deportation Before a Claim has been Determined: The ESA should explicitly prohibit an employer from forcing "repatriation" on an employee who has filed an ESA complaint.

ix. Regulate Migrant Worker Recruiters

28. Employment standards must include regulation for migrant worker recruiters, including the following features:
    - Compulsory licensing and publication of recruiters;
    - The use of financial bonds;
    - Compulsory registration of employers;
    - Joint and several liability between recruiters and employers;
    - Mandatory reporting of recruiter supply chains in Canada and abroad;
    - Mandatory and detailed reporting of recruiters' business and financial information;
    - Explicit recruiter liability for actions further down the recruiter's supply chain.

x. Effectively Enforce the Rights Protected by the ESA

29. End the "self-help" hurdle: Remove the ESA provision that allows the Ministry of Labour to require a worker to first attempt to resolve the violations with their employer.

30. Establish options for anonymous complaints: Workers must be able to file a claim confidentially, where the worker's name is known to the Ministry, but not to the employer. The Ministry of Labour should follow the policy of the Wage and Hour Division of the US Department of Labour to protect the confidentiality of the complainant in their investigations. If it is necessary to reveal a complainant's name to the employer, in order to pursue an investigation, then the Ministry must seek the permission of the worker to do so.

31. And Establish options for third party anonymous complaints: Unions, community organizations, or other individuals or parties should be able to file anonymous complaints on behalf of an individual or a group of workers. Where individual or third

party complaints refer to violations that affect more than one worker, then the workplace should be subject to an ESA inspection. Inspections of employers should aim to detect and assess monetary and non-monetary violations, remedy violations with orders to pay for all current employees, and bring the employer into compliance for the future. Anti-reprisal protections must be provided to workers, whether their complaint is anonymous or not. An appeal process should be available if the Ministry of Labour does not proceed with an inspection and if an inspection proceeds, a report should be made available to all employees.

32. Place the onus on employers to disprove the complaint: It can be very difficult for workers to gather the necessary evidence, when key information is entirely in the hands of employers. A reverse onus would remove a significant barrier to making a claim.

33. Improve anti-reprisal protections: There is widespread fear of reprisals amongst workers. The current anti-reprisal provisions do not protect workers while they are employed and the cost of reprisal to employers is not a significant deterrent to employers. ESA protections would be strengthened by: providing an expedited anti-reprisal process with the option of interim reinstatement; publicize anti-reprisal claims; prohibit employers of migrant workers from forcing deportation of an employee who has filed an ESA complaint. The Ministry of Labour should work with the federal government to ensure that migrant workers who have filed complaints are granted open work permits so that they may continue to work while their claim is investigated.

34. Investigate all individual complaints: The current requirement to investigate all individual claims of employment standards violations must be maintained.

35. Proactive Inspections: The Ministry of Labour should target proactive inspections in workplaces where misclassification takes place and where migrant and other people in precarious work are employed. Any such inspections must ensure that they do not further jeopardize migrant workers.

36. Conduct inspections when individual claims confirmed: The Ministry of Labour must adopt a consistent strategy of expanding investigations when ESA violations are confirmed through individual claims to a full inspection of the employer.

37. Increase the fees payable by violators: The ESA should increase the administrative fee payable when a restitution order is made to include the costs of investigations and inspections.

38. Ensure settlements don't make violations cheaper than compliance: The ESA should establish criteria for settlement of complaints, in which settlements cannot be for less than a worker's legal entitlement.

39. Impose significant consequences for violations: Right now, there are more advantages to those violating the law than to those adhering to the law. Key changes that will reverse this trend include: automatic fines for all violations; increased fines; requiring employers to pay damages equal to twice the unpaid wages owing; requiring employers to pay interest on wages owing.

40. Ensure workers get what they are owed: The province must establish a provincial wage protection plan, paid for by employers. The Ministry of Labour must have the authority to issue warrants and/or place liens on personal property; extend liability to the recipient of a debtor's assets; impose wage liens on an employer's property upon filing of a complaint where there is a risk of non-payment; require a bond to cover future unpaid wages where there is a history of contraventions or in sectors with high rates of violations; revoke licences and permits for those who fail to pay.

xi. End the Exclusions from the *Labour Relations Act* for Migrant Worker Dominated Sectors

41. Remove the exclusion of domestic workers from the LRA (including workers under the Caregiver Program)

42. Remove LRA exclusions of agricultural and horticultural workers and repeal the *Agricultural Employees Protection Act*.

43. Adopt sectoral bargaining and representation that fully enables workers to unionize and bargain collectively: Meaningful models of collective bargaining require the participation of migrant workers in their development. Without such participation, any broader-based bargaining models would lack both legitimacy and effectiveness. For work that is spread out to different locations, the goal should be to enable workers to organize and bargain collectively from multiple locations with the same employer/franchisor. For sectoral bargaining, there must be a process for designating an employer entity that is the counterpart in bargaining and to recognize the triangular relationship involved in some employment relationships involving recruitment agencies and employment agencies.